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Wisconsin, Supreme Court

WISCONSIN REPORTS of

174

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 5—SEPTEMBER 23, 1921

FREDERICK W. ARTHUR

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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FRANZ C. ESCHWEILER
WALTER C. OWEN
BURR W. JONES
CHRISTIAN DOERFLER
(From April 19, 1921)

Attorney General - - WILLIAM J. MORGAN
Clerk - - - - ARTHUR A. MCLEOD

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MEMORANDUM.

Mr. Justice DOERFLER took no part in the decision of the cases reported in this volume on pages 1–99, 107–135, 140–232, 321–353, 458–506.

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Amendments to Supreme Court Rules.

In force after August 9, 1921.

RULES 6, 7, 9, 10, 11, 13, 19, 22, and 34 of the Supreme Court are amended so as to read as follows:

RULE 6. In calendar causes appellant or plaintiff in error shall print a case containing an abridgment of the record in narrative form so far as necessary to present the questions for decision and the opinion of the trial court, if any, stating at the beginning whether a judgment, an order, or both, are sought to be reviewed, and giving the name of the trial court and the name of the judge who presided at the trial. The case shall be paged and shall mention each paper not printed or abridged, with an appropriate reference to the page of the record where it is to be found.

RULE 7. Each case of more than twenty pages shall have a printed index alphabetically arranged referring to each paper in the case and briefly indicating the nature or contents of the same, including exhibits, the names of the witnesses of each party arranged separately and alphabetically, and the pages of the direct, cross, or redirect examination.

RULE 9. In calendar causes each party shall print a brief giving references to the pages of the record and printed case for each statement and proposition based on the record. When a statute is involved in a question raised on appeal, so much thereof as is necessary to a decision of the case shall be printed at length. Every brief shall contain on its front fly-leaves a subject-index with page references, the subject-index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

RULE 10. The brief of appellant or plaintiff in error shall contain a concise statement of the nature of the action and the issues involved, the result of the trial in the court below, the errors relied upon, the leading facts or conclusions which the evidence tends to prove, the principles of law applicable and the authorities in support thereof, giving the names of both plaintiff and defendant, number, name, and page of report each time the case is cited.

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RULE 11. The brief of the respondent or defendant in error may also state the leading facts or conclusions which the evidence tends to prove, and the principles of law in support of the same, with authorities, cited as required in Rule 10.

RULE 13. Cases and briefs shall be printed plainly with black ink in type not smaller than ten point nor larger than twelve point and leaded with a two-point lead, on white paper, properly paged at the top, with a printed page seven inches long and three and one-half inches wide centered in a page trimmed to a size seven inches wide by nine inches long, and saddle-stitched when practicable, bound in a paper or cloth cover, having the title of the cause and designation of the brief printed in appropriate type on the outside, and shall be signed by counsel presenting the same. If special permission is given to file typewritten memorandum or reply briefs, they must conform to the size page above stated, viz., seven by nine inches.

RULE 19. At least twenty-four hours before a cause is called for argument the plaintiff in error or appellant shall file with the clerk fifteen copies of the printed case, and each party fifteen copies of his brief.

RULE 22. In line 4, August 15 is changed to August 1.

RULE 34. Unless otherwise specially ordered, oral arguments will be limited as follows: Two hours on each side in causes wherein the amount in controversy, exclusive of costs, is $10,000 or over; one hour on each side in causes wherein the amount in controversy, exclusive of costs, is less than $10,000 and more than $1,000; and one-half hour on each side in all other contested matters.

It is ordered that the foregoing amended rules take effect and be in force on and after August 9, 1921.

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IN MEMORIAM.

CHIEF JUSTICE JOHN BRADLEY WINSLOW.

On the 3d day of May, 1921, Mr. R. D. Marshall of Madison presented the following

Memorial of the State Bar Association.

May it please the Court:—The State Bar Association, at its annual meeting in September last, appointed a committee composed of R. D. Marshall as chairman, with Harry L. Butler and Charles E. Buell of Madison, Frank M. Hoyt of Milwaukee, and W. F. Shea of Ashland as associates, in its behalf, to present here a memorial accompanied by such remarks as the committee might deem appropriate to the occasion, formally announcing the passing of the late beloved and distinguished Chief Justice of this court, JOHN BRADLEY WINSLOW, deservedly closing his history on the records where he served so long, and richly won a place of prime significance in constructing and administering as efficient a system, it is thought, of law for redressing and preventing wrongs as human wisdom has yet created. The duty the committee was thus commissioned to perform is characterized by such a degree of sadness to the one designated to speak for the committee, as not to be fully appreciated by those who do not know how the lives of men who work long years together here become blended, as it were, and cannot be known without there being opened to them the sealed book of unwritten and unwritable "History of a Great Court." Too bad the people cannot know more of the unselfish, sacrificial labor of the members of this high court in administering the law as it is given to them, and so look thereto for the proper test of efficiency instead of to the mere instrumentalities commissioned to apply it, not adding anything thereto nor taking anything therefrom—excuse the seeming digression. With the characteristic of sadness there is a sense of satisfaction with the solemn opportunity afforded for actively participating in closing with honor the official record of one so highly regarded as was the subject of these proceedings—one who wore the official mantle of high position with such universal satisfaction to the people as did the late Chief Justice.

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Chief Justice John Bradley Winslow.

By request, advice, and approval of the committee, what I here present has been prepared with confidence that your Honors will accord it a place upon your journal.

Perhaps it were better that some other hand than one so near the subject had been chosen to phrase this memorial. It could hardly be expected that so intimate an associate could so step outside the personal circle as to be capable of well picturing the dignified idealistic character, in popular conception, of a Chief Justice; but the beloved WINSLOW was a very human man; while appreciating the becoming reserve of his station, he was able to maintain it without effort to disguise that delightfully humorous, companionable, social side of his nature which made him the peculiarly attractive figure that he was, whether in the social circle or presiding as the head of this court. He made no attempt to surround himself with that air of repellent dignity which is often thought to be necessary to properly characterize his high station; yet there was something in his make-up which always guarded him from being annoyed by friendly intercourse. So it is hoped this memorial and the judicial response will speak to those of the present and the future so long as this court shall survive, picturing the subject we respected and loved as he really was—picturing him with those characteristics which were the charm as well as the admired of his life.

JOHN BRADLEY WINSLOW departed from us on the 13th day of July, 1920, at his residence in Madison, this state. His origin, in the true sense, was noble but humble. The father, through a long line reaching back to and beyond the Puritan Plymouth Colony of cultured English gentlemen,—of heroic leadership sort,—was not possessed of fortune to afford his only son any very marked educational or other advantages aside from those of the new, quite undeveloped pioneer Western country. However, that was not a serious handicap for the young candidate for future leadership in our state, because one of the superior natural ambition, which early was quite manifestly a characteristic of him, under the guiding hands of the cultured father and mother who gave him that special attention which made the rather precocious but gentle boy a companion of his parents and stamped efficiently their personality upon him, would be likely to develop rapidly and evince those marked worthwhile qualities which were noticeable in the particular case at an early day, and became more and more evidenced from youth on to the end. There was no cessation in his advancement from the time he was of capacity to appreciate the duties and responsibilities of life until he reached the highest position of public trust and favor within the competency of the people of his state to clothe one of its most worthy citizens with.

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Chief Justice John Bradley Winslow.

The deceased was justly entitled to much pride of ancestry, as has been seen, though he was not given to counting for credit on that. He really seemed, to those who knew him most intimately, to care little if anything for distinction other than such as was accorded him for his own individual accomplishments. His uniform modesty of silence as regards himself and family history, except when interrogated in regard thereto by some one seeking for historical data which the public was entitled to know, is evidenced by the comparative dearth of biographical sketches of his life and the evident reluctance the few that exist indicate to indulge in anything like self-praise. He really seemed not to care for that superficial character which is commonly created by self-sought write-ups and pictorial displays,—to care only for the rewards which might come to him in recognition of personal worthwhile accomplishments, and as to such to let his works rather than his words tell the story. The habit in that respect, to be appreciated, must be viewed in the light of the much that he might well have said and the fact, before alluded to, that he was a direct descendant of sturdy, heroic pioneers and reformers in the cause of religious and civil liberty, significant among them being the Winslows, who were leaders in the initial, but successful, effort to establish in the new world a government of constitutional liberty,—one then little understood and less generally appreciated,—grounded on the truth that "all men are born equally free and independent and have certain inherent rights; among these are life, liberty, and the pursuit of happiness,"—rights regulable by laws consented to by the governed and designed to conserve, to preserve, and to make efficient, never those which destroy or seriously impair Nature's inestimable heritage. The early initiation of that system which now so influences the destinies of the human race, in general, was an event of greater moment, it can now be seen, than any other single circumstance of human origin of which history bears record. The Winslows—Edward, John, Josiah, and others—were in the vanguard of that great work and so are justly entitled to be considered noblemen, in the true sense, and the subject of our memorial, for the truth of history, to be recognized as of their blood.

The characteristic features of those early pioneers marked the career of the deceased Chief Justice from his advent into public life to the end. He was born at Nunda, Livingston county, New York, October 4, 1851. His father, Horatio, was principal of Nunda Academy. The parents on both sides were of colonial ancestry, the mother, Emily Bradley, being a descendant of the Puritan colony which located at New Haven in 1639. Both families became residents of New York in 1800 and there experienced the

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hardships of the pioneer life of those days. Horatio Winslow graduated from Union College in New York. While taking his classical course there he studied civil engineering to some extent, which was of great service to him upon his being compelled to give up teaching.

When the deceased was two years of age, failing health from indoor work led the father to resign his position at the Nunda school and give up the idea of entering the legal profession for which he had made some preparation, and seek a home in the then far West, where he could turn to an out-of-door life. On account of his having relatives in Illinois and Wisconsin he started for that region, but was induced to remain a while in Ohio and engage in the business of railroad engineering. He was joined there by his family. During the stay in Ohio his health was quite well restored. In about two years, and when his son JOHN BRADLEY WINSLOW was four years of age, he journeyed with his family to Wisconsin, bought out a book-store business in the then village of Racine, and a small tract of land for the family home a few miles out from the village. He conducted the book-store business for some twenty-five years, cultivating, in the meantime, his small acreage, and customarily driving from and to the country home twice a day and becoming a leading member of his section in educational and other public matters. The small tract of land was hardly large enough to be thought of as a farm, other than for gardening. He did not purpose settling there to become a farmer, but rather as a convenience in pursuing business, suitable to his education and experience, and as a means of affording his family the advantages of a country home with a minimum of the cares and hardships of a farm. In that he was successful, as his method gave him the out-of-door life necessary to his health and a somewhat ideal environment for developing a strong, Christian, well-balanced character for his son JOHN, in preparation for the active participation in the important activities of life for which, it was thought, he was probably suited and destined.

The late Chief Justice, after receiving the pretty full benefit of the good public school system of his locality, efficiently supplemented by home training by his cultured father and mother, entered Racine College, then an institution for higher education of superior repute, fostered by the Episcopal Church and presided over by that eminent divine of his day, Dr. De Koven, who gave to the school the character of a high class denominationally conducted English college, with its elevating moral and Christian influences, reaching and making an enduring impress upon the individual student. The particular student was naturally susceptible of being molded into what he became, by his refined environment. It was doubtless a

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directing and guiding influence which abided with him and held him firmly and beneficially to the end of his days.

JOHN BRADLEY WINSLOW, after studying under Dr. De Koven for six years, in 1871 graduated with high honors and the degree of bachelor of arts. He then became an instructor in Greek at the institution, but soon discovered that such employment did not fit the measure of his ambition, so he turned to preparing for the legal profession, commencing his studies in the office of E. O. Hand, a then prominent lawyer of his home city. He continued his studies there until 1873 and then in the office of Fuller & Dyer, who were leading lawyers of Racine, until 1874, when he entered the Law Department of the State University, from which he graduated in 1875.

The diligence with which our subject applied himself in preparing for his life work is shown by this record of his having acquired a well rounded out, quite finished education, qualifying himself for the special work of a lawyer, and then gone through the technical field for it in law office and law school work, and secured the accredited degree it afforded in the short space of three years. He was then well equipped for his chosen career, as subsequent events bear most convincing testimony. Soon after his graduation from the Law School he became a partner of Fuller & Harkness in the practice of his profession, and later of Mr. Fuller, and, still later, of Mr. Charles A. Bronson, and then of the late Joseph V. Quarles, with whom he was associated until he became circuit judge of the First circuit of the state, composed of the counties of Racine, Kenosha, and Walworth. He was elected by a large majority to that office in April, 1883. Theretofore he had served five years as city attorney of the city of Racine, in which position the people, observing his possession of that superior judicial temperament which distinguished him in his thirty-seven years and more of judicial service and with steadily progressive significance, elected him, as before stated. He was but thirty-two years of age when he was so chosen; thus coming to the high office of circuit court judge at such an early age, it is difficult for one quite familiar with the history of our state to mention another instance.

On January 19, 1881, the now prominent young lawyer and Miss Agnes Clancy consummated a long and, perhaps, rather more than ordinarily delightful courtship by becoming husband and wife. For nearly forty years thereafter they happily and quite ideally traveled life's pathway together, the difference on religious lines, he being a most devout Episcopalian and she a likewise devout member of the Catholic Church, not militating against a very delightful matrimonial companionship. Long years, and until the almost tragic ending, they journeyed together and reared their

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family tree of two sons and four daughters, all of whom, with the mother, survive.

Without political influence or self-seeking to be singled out or preferred for public favor, really, though somewhat at a disadvantage by his being a member of the minority political party in the state, just by superior personal qualities of head and heart and credit, richly won, by constant devotion to performance of professional and official duties, the deceased was kept in the position of circuit judge, to which he was elected in 1883, without opposition after his incumbency commenced, until he became a member of this court. His career on the circuit bench early attracted attention to him as a probable member of this court. Opportunity for advancement thereto occurred in 1891 by the decease of Associate Justice DAVID TAYLOR. Then Judge WINSLOW was forty years of age,—quite young, it might have been thought, for the exalted position of a Justice of the Supreme Court of a great state. His record as circuit judge was sufficient commendation therefor and the voice of the people was unmistakably in harmony therewith, as is amply vindicated by subsequent events, in that he was elected, and re-elected again and again, and always without opposition save a single and not very serious exception, that opposition being invited, it is thought, solely because of the Justice being in the minority political party. The majority against the political party of which the deceased had always been a member was then very large, making his success in overcoming it one of the most significant events of his life, indicating the judgment of the people regarding his fitness for the high place he occupied.

It is a matter which may well be recorded that, though the deceased was a member of the minority political party, he overcame that disadvantage, such as it was, and occupied the position of a member of this court for some more than twenty-nine years, the last thirteen being as its Chief Justice, and all the time grew in public favor up to the particular event characterizing his closing hours, hereafter briefly alluded to. In the meantime he was honored by the degree of LL.D., conferred by the University of Wisconsin, 1904, and the same, conferred by Lawrence University, 1912, he put new life into and greatly stimulated the growth of the State Bar Association, was its president for the constitutional limit of time, was a prominent member of the American Bar Association, was mentioned with much favor for a place on the federal Supreme Bench, was president, for years, of the American Institute of Criminology, did much general work of a public character, was the author of the standard work—the one most in use in this state—on legal and business forms, contributed numerous articles to legal publications, was the author of the "History of a Great Court,"

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modestly resting from his labor in that regard upon reaching the period of his own activities in such court, participated in deciding somewhere around ten thousand cases presented here and in writing ninety-two volumes of Wisconsin Reports, by which he was required to deal with almost every conceivable principle of law, restating many of them in the light of their application to new as well as old situations, bringing them down to date, and eliminating seeming departures therefrom, by retracements and reintrenchments, in unmistakable language and, particularly, turning the judicial vision, in some instances, away from old-world notions which had been somewhat improvidently, we may be permitted to say, engrafted on the judicial system of our country, quite inconsistent, as we have found, and as he, himself, firmly proclaimed with unanimous approval, with our basic principle of natural inherent rights, the most significant instance, perhaps, being *Nunnemacher v. State*, 129 Wis. 190, and particularly, efficiently repelling, by emphatic assertion and consistent history of events, all just ground for criticism of our judicial system so far as justice being prejudiced by delays and other disturbances of administration by inconsequential irregularities and nonprejudicial, from the standpoint of real merit, infractions of technical rules, and firmly establishing the policy here that this court, once in possession of a controversy and of jurisdiction of the parties, will hold firmly thereto for a just and permanent peace between the contestants, regardless of misconceptions or mistakes of professional representatives, thus rendering justice as speedy, certain, and free from burdens as practicable.

In all this there was a great work done in which all members of the court who labored with the deceased participated with credit to themselves, to this great tribunal, and to our state. All did their due part in consummating the great work of constructive, reformative, and progressive judicial building. For the truth of history I may be permitted to say this, without its being regarded as other than purely impersonal. Our vision must not be turned from significant truths because one of our number—and that one the instrumentality which is the painter, in the main, of the language picture of the deceased Chief Justice and his activities—participated therein. Otherwise it were better, as before suggested, that some other hand were chosen to phrase this closing record.

May it please your Honors,—there stands the picture—painted in truth as we deem it due to the memory of the beloved Chief Justice WINSLOW, that it should be placed upon the journal of this court. It is believed to be uncharacterized by exaggeration of events or extravagance of coloring. Let it measure up the subject of our thoughts for those of the present and those of the future, as we who knew him best and with much restraint, we may

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say, and melting hearts, in brief general terms, have endeavored to tell the instructive, interesting and, in many respects, beautiful story of his life. What possibilities it will suggest to the young ambitious man of the attainments which are within his competency to acquire by good character, industrious habits, and self-culture, unaided by high station of birth or possession of wealth! How it teaches that none of such is necessary to enable one to write his name high up in the temple of fame, up among the few immortals that are not born for oblivion! Our Brother WINSLOW, who served the people of this great state so long and well, himself so inscribed his name in most indelible letters. We do not need to do it. It would be a work of supererogation to attempt it. There it is,—where he with consummate industry and constancy placed it. Not with conscious ambition for personal significance; but just with his natural-born, constant, irresistible determination to do his full duty to himself, to his country, and to humanity, and to leave the world better—richer—and happier for his having lived in it. For that, without expectation of personal, pecuniary gain or conscious hope of any earthly crown, he fought the battle of life, successfully, with all adverse circumstances, and at last quietly passed over the river into the impenetrable shadows of eternity, with heart overflowing with regard for those he associated with and those he served, and love for his devoted family. Suddenly, as it were, the inevitable was disclosed to him when it was commonly supposed he had yet long years to serve in the high place he occupied in the administration of justice. Rapidly, then, and with the courage of faith in the reward which is promised beyond earthly vision or knowledge, with contentment that one who had, for long years, served with him in the high public station would, most worthily, receive his official mantle as it fell from his shoulders and thus absorb the public shock of his passing, and without sense of personal loss except of opportunity to do more for his family and for the cause of justice—he walked upright, as it were, down to the shore of the last river in conscious presence of his best beloved—and slept.

How reluctant the warm-hearted WINSLOW was to dwell upon the final end which he appreciated was in sight, is told in these few lines he wrote to Mr. Hoyt of our committee, a short time before he passed from us:

"I had thought to acknowledge your kind note quite a while before this, but I can only write a few letters and those not long.

"It is not necessary, I think, to assure you of my affection, but I do so now and add to it my gratitude for your last kind action. I am fighting a hard battle and we may not meet again. I'll not say good-by, but express the hope that in some better world I may bid you good morning."

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Chief Justice John Bradley Winslow.

In the last hour his pathway was made smooth and "Dying bed soft as downy pillows are" by the testimonial in the form of a substantial fortune from the Bar he loved so well and which so reciprocated that love, that striking evidence being speeded to him that it might reach his hand while he was yet conscious of it, and so would not be unduly saddened by thought of the loss by his passing to his life's companion and children who had long been the subject of his most absorbing solicitude—causing the now expiring spirit, in almost whispered accents, to exclaim, Wonderful—Wonderful—Wonderful!

On that bright July morn—a few days later—the rays of the summer sun tingeing and radiating from the new green of Forest Hill to "all around the spot where we stood," encircling the last prepared long home of the mortal of the beloved WINSLOW, our thoughts were of how appropriate to the scene and circumstances the words of a predecessor on the occasion of the memorial proceedings in these presence in honor of an earlier departed Chief, "everything which the eye rested upon was serene, pure,—beautiful and glorious—and so was his life—and so it closed,—leaving a name illustrious with professional fame and honor." Thus colored and covered with beautiful flowers, from numerous loving hands, the tenement of the spirit which—let us hope—was now consciously hovering near, was gently lowered into the earth from which it came; there to sleep—seemingly, in view of the tiresome waiting the final call,

What restful, sweetly restful sleep,
Continuing on—on through the eternity of years,
"Yet ever to live in fame if not in life."
"Rest—Oh! such blissful, blessed rest,
After the distressful waiting at
The border land 'twixt time and eternity.
After all—Oh! life did seem to close too quickly
For one so full of sunshine and so set
Along the way with beautiful flowers,
Casting into shadows of forgetfulness,—
Let us hope,—
The minimum of sorrows from which
It was not—could not be free."

As we rest from our labors in presenting to the court the picture, in words, of its late distinguished and highly regarded Chief,—our friend—our brother,—there is so much more that might be said—so much of that which might be regarded the little things of a loving and most lovable character,—so much along the border line of, or reaching into the personal, but which seems crowding up in

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offering of an attractive setting for a singularly good and useful career—we hesitate to close—*we hesitate to close*—but lest we trench on the inappropriate for the particular occasion, a few more words and we must,—reluctantly,—rest. Truly,

"The best portion of a good man's life
Are little nameless unrecorded acts
Of kindness and of love."

The life we have inadequately, we fear, pictured in this memorial was rich in those unrecorded and unrecordable "acts of kindness and of love." They will only live among the pleasures of memory and sink into oblivion with the passing of those who were the direct recipients of them. Of him it cannot be said as of an illustrious predecessor on an occasion like this: "The world honored him but could not love him." Here, if not great in the popular sense, the world not only honored him, but every one who knew him or of him,—loved him; and that is the just measure and indication of greatness.

These lines well describe what we may suppose was the state of mind of the deceased in the closing hour of his interesting and memorable life:

"I am weary of my burden
And fain would rest."

"Every leaf upon its shore lines
Is a gem;
Not a withered one is drooping,
While the hand of love is looping
And into garlands grouping
All of them."

"In that world there is no sorrow,
Not a tear;
Never comes the broken hearted,
From whose eager life departed
The hopes that once had started
Fond and dear."

"Lead me to that land of beauty
So I may abide;
Lead me where the flowers are blooming,
Where the music mild is wooing,
Where the hand of love is moving
On every tide."

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"I will take my burden for a pillow
And lie down to rest;
God's love shall dwell beside me,
And no cloud shall ever hide me
From the loving ones that guide me
To the portals of the blest."

Now, may it please the court, we rest and await the reception of this memorial and the order, which we pray, that it be spread upon your journal and thus made as immortal as earthly things can be.

Dean H. S. Richards of Madison presented the following

Memorial of the Faculty of the Law School of the University of Wisconsin.

The faculty of the Law School of the University of Wisconsin, of which Chief Justice WINSLOW was a member at the time of his death, mourn the passing of more than a brilliant and genial colleague. They feel that this occasion, so rich in tributes to him as a lawyer, as a judge, and as a distinguished citizen, ought not to pass without some mention of his great, sustained, enthusiastic, and effective interest in legal education.

He was himself a graduate of the University Law School at an early period when its facilities for instruction were extremely meager. But he never fell into the error, so frequently and so easily indulged, of thinking that the education which had produced him was good enough for any one. He was a progressive all his life, a sane and sensible but steadfast progressive in the best sense of the term, and he would not have the profession to which he was devoted exempt from the law of progress. He viewed with interest and approval and gave his earnest support to the increasing facilities for legal education. He felt that in the character and scope of that education lay the hope of the progress of the law and the usefulness of the profession. In an address before the Section on Legal Education of the American Bar Association in 1912 he said:

"The profession is overrun with money-makers, who regard it only as a business by which money is made, with little or no thought of the quality of the means used. We greatly need many more lawyers who regard the profession as a ministry in the temple of Justice, for they are the men, and the only men, who will desire to make the procedure simple, prompt, and effective."

He spoke in a similar vein to successive law classes that came before him in this chamber during a long series of years for ad-

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mission to practice. Seldom did he omit to impress upon them in language solemn and effective at any time and place, but doubly so at the time and place of utterance, the high nature of their calling and the great obligations and responsibilities imposed upon them by the advantages they had enjoyed. These little addresses were often of such singular felicity and nobility that it is to be regretted that they have not become part of the records of the court.

The cause of simplified procedure was very dear to his heart, and here again he looked to legal education as one of the most effective means of accomplishing it. Thus in the course of the address already quoted from he said:

"It seems, therefore, unquestioned that if we are to have a simplified procedure which shall accomplish the desired results, we must first have a scientifically educated as well as high-minded bench and bar to administer that procedure. Every law school should give its students a course in scientific simplified procedure, or ideal procedure, if you choose."

Chief Justice WINSLOW's vision of a simplified scientific procedure administered by a high-minded bar to the ends of justice found its hope in the law schools and their training, and its utterance was not confined to stately or formal occasions. He was an invariably invited and usually responsive guest at all meetings of law students, even the most informal, oftentimes, without a doubt, at the cost of much inconvenience to himself. His talks to them, on such occasions, on the duties of the lawyer and the great traditions of the profession, no less than his more formal discourses as lecturer on legal ethics in the Law School, were unquestionably a large factor in shaping student ideals.

But Justice WINSLOW's interest in legal education was not confined to an advocacy of lofty ethical ideals and of a reforming and progressive spirit. He believed in preparedness. He thought that, as law touches every human interest, the lawyer should be trained in economics, history, the philosophy of law, and particularly in a knowledge of other systems of law, such as the Roman law, which governs more than half the civilized globe. In an article on "The Essentials of Legal Education" he said:

"I believe it to be of the greatest importance to the modern lawyer that he have some education in these great subjects if he is to be more than a mere pettifogger and money-grabber. . . . The lawyer of the future must be not merely a high-minded lawyer, as we know him in the past, but a learned man, a philosopher-lawyer, whose outlook has been broadened by the study of other legal systems, and who has an open mind when considering the new questions that are daily arising. . . . It is certainly time that American

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lawyers became philosophers. Precedent does not and cannot solve the many new questions presented for solution."

But, after all, his greatest influence lay, not in his discourse, uplifting as it was, but in his life. He lived the life he advocated, a simple, kindly man, uninfluenced by the common lure of wealth, studious, and with a mind wide open to every avenue by which new knowledge might approach. He held power not to aggrandize himself but as a means of service. He passed to his last reward as a just and good man should pass, at the full tide of his powers and influence, leaving a memory that cannot fail to exalt his profession and inspire young men coming to the bar with a high sense of public duty and private rectitude.

Mr. Frank M. Hoyt of Milwaukee presented the following resolutions adopted by the

Racine County Bar Association.

WHEREAS, Honorable JOHN BRADLEY WINSLOW, formerly a resident of Racine and a member of the bar of this county, afterward, from 1883 to 1891, judge of the First judicial district of Wisconsin, and then, for the remainder of his life, a member of the Supreme Court of the state, and since 1907 its Chief Justice, died at his home in the city of Madison on the 13th day of July, 1920; and

WHEREAS, the members of the bench and of the bar of Racine county desire to place on record, in plain, simple, and sincere phrase, as would be his wish, their appreciation of the character of the deceased Chief Justice, and an expression of the sorrow and sense of loss which they feel because of his death:

Therefore, *Resolved,* by the members of the bench and of the bar of Racine county, that in the death of Honorable JOHN BRADLEY WINSLOW we recognize the passing of one of our country's greatest jurists,—of a model trial judge, and a keen-minded, dignified, but kindly presiding Justice in the state's highest tribunal,—of a devoted and constant servant of justice,—of an alert and patriotic citizen animated by high purposes and of unsullied character,—an upstanding, manly man of broad human sympathies,—in private life a lovable friend and companion, and a scholar whose accomplishments were broad and unusually complete.

Further *Resolved,* that as a mark of our heartfelt sorrow over the death of Chief Justice WINSLOW and of our respect for his memory, these resolutions be offered for record in the courts of record of Racine county and a copy thereof be forwarded to the family of the deceased and a copy also to the clerk of the Supreme Court.

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Mr. Hoyt then spoke as follows:

The memorials presented to the court express the sentiments of the entire bar of Wisconsin. We pay these tributes to the memory of the great judge, who administered justice without fear or favor,—loving truth, hating evil,—the patriot devoted to his country and the public good,—the man pure of heart, of stainless life, of great learning and ability, yet so modest, so kindly, so affectionate, that our recollections of him are like benedictions, softening our sorrow, and urging us to be ever worthy of the friendship he gave us.

Mr. Chief Justice SIEBECKER responded:

A sense of bereavement saddens our hearts when we think of the loss of Chief Justice WINSLOW as a member of this court. His death spread deep grief and sorrow among the people of Wisconsin and among his admirers beyond the borders of the state. It brought to all a keen realization that a man who had eminently filled the place of a kind, loving husband and father, a good neighbor and friend, and a distinguished citizen had been withdrawn from the active stage of life.

Chief Justice WINSLOW was a willing worker, whose mind and soul were aflame with a passion for truth and service. He looked upon the affairs of life as a challenge and as stern realities. His tenor of life displayed a sincerity and simplicity of nature which attracted every one by its spontaneity and freedom from show and ostentation. In his intercourse with men he was generous and friendly, in keeping with his democratic sentiments and kindliness of heart. These qualities were the ties that bound him dearly to all who knew him and elicited an affectionate esteem and deep admiration of his manly virtues.

As we recall him to memory we can see the dominant qualities of his mind and character and the controlling power and influences that shaped and molded his personality. The recital of the external incidents of his career presented in the memorials gives us a glimpse of his activities and the course of events through which his spirit and ideals sought expression. The events of his career show us that he was of that high type of manhood that placed him among the ranks of mental and moral leadership. That he was richly endowed in these respects is manifest from the many public activities in which he was engaged and the success which attended the tasks imposed on him. Yet the purposes and purity of his life, the strength and power of his attributes, and the estimable qualities of his nature were more fully revealed in the intimate relationship of companion and co-worker. By long and intimate service with him, one learned to know his inmost thoughts of justice, his

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conceptions of obligation to his fellow man, and the impelling forces that controlled him in the discharge of his public duties. In his work he was swayed by a love of justice and the spirit of brotherhood. The services he rendered were enriched by knowledge and wisdom that he gathered through experience. He brought most valuable contributions, through his knowledge of the law and his sound and honest judgments, to help solve the perplexing problems that must necessarily be submitted to a court of justice. His method was that of a strong and reflective thinker and a worker who persisted in his efforts until his allotted task had been performed. The influence of his work operated like the effective powers of nature,—silent, forceful, and incessant. It was a delight to observe him marshaling his abilities and exerting them in a most serviceable manner. He always proceeded in a direct, logical, and firm way to reach the conclusions which are so admirably expressed in his recorded opinions. His spoken and written words are pregnant evidences of his fruitful and creative imagination, which gave to his utterances an illuminating and penetrating character. His literary style has the rare qualities of clearness and conciseness; his thoughts are clothed in forceful and refined diction. In judicial reasoning his efforts are marked by clarity and force of exposition, and the products of his labors in this field vindicate his eminent fitness for the position of a judge.

While he earnestly strove to know the established law and administer it to promote the ends of justice, yet he was not unmindful of the fact that the changing conditions in the affairs of men are not always justly regulated in the accustomed and beaten paths of the law, and that they need to be viewed in the light of their new relations. Nor was he given to following mere precedents unless they were in accord with well established principles of right and wrong, knowing full well that any system of jurisprudence, however well designed and excellent it may be, needs in the course of time to be modified to meet the changes incident to the evolution of social conditions. In these respects his long service as a member of this court is characterized with a profound sense of its responsibility and a sincere devotion of his energies and abilities to discharge his full measure of duty. He was always ready to do everything within his power and to make any sacrifice to sustain successfully the highest purposes of the judicial function. These qualities and characteristics made him the strong, able, and upright judge whom we all so highly appreciated and esteemed.

The interest he displayed in his intercourse with the members of the bar is well known to us all. In this he was always prompted by a spirit of friendly co-operation and helpfulness to aid the members of the profession in the discharge of their important functions

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in the administration of the law. It is a comforting and gratifying thought that such devotion to the profession elicited the heartiest response from its members through their respectful appreciation of his efforts and that it bound them closely to him as a judge and a friend. His charm of good fellowship in personal intercourse with them was fruitful of endearing friendship and won from them a high esteem and respect. These ties of intimate professional relationship and the manifest independence he displayed in performing his judicial function spoke more significantly than words can portray the force and character of the man in discharging the important trusts imposed on him by the people of the state.

He labored faithfully and earnestly to build the structure of Wisconsin jurisprudence. In this work he was ever moved by the ideal that there is always work to be done for improving the law and making government an efficient agency in administering equal and speedy justice.

He loved his state and its people, he was patriotically devoted to their institutions, and gave unstintedly of his talents and strength to promote the people's prosperity and happiness. He labored in the faith that man's highest achievements are to be attained as an earnest warrior in the struggle for truth and justice "to vanquish wrong, to save the right."

GEORGE GRISWOLD GREENE.

Mr. Samuel D. Hastings of Green Bay presented the following

Memorial of the Brown County Bar Association.

May it please the Court:—At the request of the Brown County Bar Association, I am here to present to this court a brief memorial of the late GEORGE GRISWOLD GREENE.

Mr. GREENE died May 23, 1920, at his home in Green Bay, Wisconsin. He was born in Brockett's Bridge, Herkimer county, New York, November 18, 1843. His parents were Nathan G. and Elizabeth Munson (Griswold) Greene. His father removed to Wisconsin and made his home at Milford, Jefferson county, when GEORGE was three years old. GEORGE was a student at the Wisconsin University for two years and then entered the military school at Fulton, Illinois. While there, in 1864, he enlisted in the Union army, in the 140th Illinois Infantry. After his discharge at the close of the war, he was graduated from the military school, and in the fall of 1865 commenced the study of law in the office of Keyes & Hastings at Madison, Wisconsin, and remained there

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until the fall of 1867, when he entered the Law Department of Columbia College, New York. He was graduated from that institution in 1868 with the degree of LL. B. He immediately returned to Wisconsin, and on invitation of Mr. Hastings, who had left Madison and become a member of the firm of Ellis & Hastings at Green Bay, commenced work for that firm, of which he became a member the following year, the firm becoming Ellis, Hastings & Greene. In 1872 Mr. Ellis became circuit judge, and the firm became Hastings & Greene, and so continued until 1884, when Mr. Hastings became circuit judge, and Mr. GREENE formed a partnership with his former partner, Judge Ellis, and Carlton Merrill, present county judge of Brown county, under the firm name of Ellis, Greene & Merrill. In 1892 Mr. GREENE left that firm and formed a partnership with Charles E. Vroman, under the name of Greene & Vroman, and later the firm became Greene, Vroman & Fairchild, by the addition of Mr. H. O. Fairchild. Mr. Vroman, a few years later, removed to Chicago, and by successive additions the firm became Greene, Fairchild, North, Parker & McGillan, of which firm Mr. GREENE was the senior member at the time of his death.

When Mr. GREENE was a young man there were many avenues open to wealth. The practice of law had not then become commercialized so as to be numbered among them. Daniel Webster had recently said, "The epitaph of every great lawyer may be written in three sentences: He worked hard, he lived well, and he died poor." The era during which that was in a large measure true had not passed. The rewards of such lawyers were largely found in the satisfaction derived from useful lives, work well and satisfactorily done, and the honor awarded them by their country and history.

Mr. GREENE chose the legal profession for his life work, and his ambition was to attain to its highest ranks, preferring its rewards to the acquisition of wealth. To do so he recognized the necessity of a broad foundation on which to build, and continued labor. Admission to the bar was easy. A little reading and office experience and a favorable report from a committee of friends, appointed by a circuit judge, was the only requisite. Mr. GREENE had no desire to enter the profession through that door. He spent two years as a student in a law office, and his studies while there continued from early morning until bedtime. This was followed by a year at law school, before he felt that he had sufficient foundation on which to build the lawyer that it was his ambition to become.

A great lawyer has been defined to be the man who sways juries, or whose clear reasoning obtains favorable judgments from courts. Sometimes the two qualities are found in the same person. More frequently the man gifted with one is deficient in the other. The

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profession recognizes the two classes of lawyers. Mr. GREENE did. All his tastes and preparations were for the latter class. I never knew him to address a jury on a contested question of fact but once. And I feel sure that that once was the only time he did so.

He frequently took part in the trial of important jury cases, but his work consisted in taking care of the law, advising his associates, addressing the court, and, occasionally, asking questions to make the testimony more clearly show a fact as he understood it. He tried court cases involving questions of fact, and his analysis of evidence and arguments on questions of fact were as strong and convincing as those upon questions of law.

In the class which he entered he became pre-eminent, and in the truest sense a great lawyer. In attaining to that position several things contributed to his success.

He was endowed with the natural ability essential to success.

He was a great student. I doubt whether the Wisconsin bar ever had a member who made greater use of a law library than he did. If it contained anything ever written or said by text-writer or judge bearing upon the question involved, he found and considered it. His studies were not confined to text-books and reported cases. They included the great writers on the theory and history of the law. As a result, I think that what Robert Ingersoll said of another great lawyer can truthfully be said of Mr. GREENE: "He understood the framework, the anatomy, the foundations of the law; was familiar with the great streams and currents and tides of authority. He knew the history of legislation, the principles that have been settled upon the fields of war. He knew the maxims—those crystallizations of common sense, those hand-grenades of argument."

But the thing that contributed most to Mr. GREENE'S success was his natural and cultivated power of concentration of thought and clear reasoning. Emerson said that the hardest work that a man can do is to think. If this be true, few men ever worked harder than Mr. GREENE.

His work, being mainly the preparation of written arguments, briefs, and opinions, was done in his private office, where he would sit for hours, head thrown back and eyes shut, in deep thought and study, tolerating no unnecessary interruption. When the problem was solved he reduced it to writing with his own pen. Then followed the condensing and polishing. What might cover a page he would often condense into a few sentences, dressing his thought in such well chosen words as to make it unmistakable. In this work, especially, during the earlier years of his practice, Roget's Thesaurus of English Words and Phrases was his constant companion. The volume he used soon required rebinding. His briefs and

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opinions became literary gems. Since his death an appreciating admirer said, "His style was all his own. I often wondered how or where he acquired it." He made it.

His prominence at the bar was not alone due to his ability. His ideas of the position and duties of a lawyer were the highest. His honesty and integrity were proverbial. He never did or said a thing that was open to criticism as unprofessional. The confidence placed in his ability and honesty is illustrated by an incident. At the beginning of a trial in which it was necessary for him to prove a long chain of facts to show his client's right to recover if the legal proposition involved was decided in his favor, his opponent, a lawyer in his class, said to him, "State the facts you expect to prove, and if you will say to me that you have competent and sufficient evidence to prove them I will admit them. I have not had an opportunity to examine the evidence."

Mr. GREENE's ability was early recognized by the bar. He was invited to leave his country home and practice and join large city firms where his services would bring him larger pecuniary rewards. He was asked by the State Bar Association to become their candidate for a member of this court. A governor requested him to accept an appointment to fill a vacancy on this bench. He declined all such offers and requests, preferring his country home and practice. It was not necessary for him to go to larger fields for business suited to his taste: it came to him. The Reports of this court show that he was employed in many important cases arising in different parts of the state, and while the state failed to secure his services as a member of this court—a position which he was so eminently qualified to fill,—it secured them as attorney in a number of important cases in which it was interested as a party.

He was most regular and systematic in his habits of life and work. An early riser, it was seldom later than eight o'clock when he reached his office, and, until his health began to fail him, he seldom left it before six. His evenings were spent at home—never at clubs. His circle of intimate friends was small. All who were fortunate enough to be included within it not only respected but loved him. He never joined in athletic sports, but daily took physical exercise in the privacy of his home. In his earlier years he was an enthusiastic trout fisher, and he always took great interest in the national football and baseball games. I have known him to go hundreds of miles to witness one, and he watched the newspapers for their results with the same apparent interest that he looked for the decision of this court in the last case he had argued before it.

Mr. GREENE was a Republican, but never took an active part in politics. He never made a public speech except in addressing a

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court or bar association. He never was a candidate for or held an elective office. He was once appointed a member of the school board of his city, but soon resigned, finding that the duties of the office encroached too much upon his professional work.

He was a member of the fraternal order of Free Masons.

He served for five years as a member of the State Board of Examiners for admission to the bar, and for four years as commissioner for Wisconsin to secure uniformity of laws.

He was a member of the American Bar Association and the Wisconsin Bar Association, of which he served one term as president.

Mr. GREENE was not only a great lawyer, but was possessed of those qualities of heart and mind which make a man great whatever be his occupation or calling.

He was generous to a fault. With no ostentation, his secret charities and acts of kindness were numerous.

It is sometimes said that any man with any force of character must have enemies. I do not think that Mr. GREENE ever had an enemy. A lawyer in active practice is apt to make them. But Mr. GREENE's professional work was not of a character to make them, and no one could ever be offended by the manner in which he conducted his private business.

He was not a communicant in any church, but usually attended the Congregational church, of which his wife was a member.

He married Nathalie Clapp of Kenosha, Wisconsin, June 10, 1874, who survives him. His only child, a son, died when three years old.

Having no child to start in life, the aid that a son would naturally have received was given to other young men. And more than one of the middle-aged members of the bar of this court, held by it in the highest esteem, are largely indebted to Mr. GREENE's assistance for their start in life.

It was my good fortune to have known Mr. GREENE intimately for more than half a century. I knew him as a law student, as a law partner, as a practitioner before the court over which I presided for thirty years; again, as an associate in our professional work, and most of that time as a brother-in-law and near neighbor. I know his life and character viewed from every standpoint. I have known no other person of whom I think it can be more truthfully said, "His life was gentle, and the elements so mixed in him that nature might stand up and say to all the world, This was a man."

A brief memorial of Mr. GREENE was adopted by the Brown County Bar Association, and at the request of said association a memorial was presented to the circuit court for Brown county by Hon. H. O. Fairchild. It has seemed to me that it is due to Mr. GREENE's memory that both of said memorials be preserved in the

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printed volumes of the Reports of this court. I present to the court copies of both and ask that they be made part of the records of this day's proceedings.

Memorial adopted by the Brown County Bar Association.

GEORGE GRISWOLD GREENE died at his home in this city Sunday afternoon, May 23, 1920, and in his death the state has lost one of its ablest lawyers.

Mr. GREENE was born in New York state in the village of Brockett's Bridge, November 18, 1843, and had practiced his chosen profession in this city for over fifty years. Jurisprudence in its broadest scope was his life work and he had much to do in molding the jurisprudence of this state. His knowledge of the law and his grasp of its fundamental principles were truly wonderful. It is said that genius is concentration, and this was exemplified in Mr. GREENE's work. To those who knew him well his power of concentration was marvelous. For days and weeks he would concentrate his mind on a single case and find an answer to the most difficult questions and a way out of seemingly hopeless situations.

One of the great judges of this state said of Mr. GREENE: "If you once concede GEORGE GREENE his premises you are lost; because he will carry you to his own conclusion by an argument and logic that are unanswerable."

Not only were his arguments convincing and unanswerable but his briefs were truly masterpieces of literary style. To receive from him a letter was to receive a literary gem.

Mr. GREENE was a great lawyer, but even more he was a great man and citizen. His ideals were high, his fidelity to his clients unbending, his love for his friends true and enduring. His many, many deeds of kindness were done so quietly that few knew of them. In the very broadest sense of the term, he was a gentleman.

We cannot hope to add to the luster of his memory by any words we may utter. We tenderly express our appreciation of his life work and of our great loss in his death and extend our deep sympathy to his bereaved widow.

May 25, 1920.

JEROME R. NORTH.
P. H. MARTIN.
ARTHUR C. NEVILLE.

Mr. Justice ROSENBERRY responded:

The memorial presented fittingly sets forth Mr. GREENE's qualities as a man, a citizen, and a lawyer. In all that is said therein the court heartily concurs. Public life had no attraction for him. As a consequence, he was not known to the people generally outside of his own district. He was widely known, however, in this and adjoining states by the members of the profession which he so conspicuously adorned, and wherever known he was loved and respected as a man and as a lawyer. He was modest, unassuming, dignified,

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a gentleman to his very finger tips. He was a man of profound learning and a scholar. Never-ceasing industry was the characteristic of his life. In the preparation of his arguments and briefs he brought to bear all his training and wonderful faculties with marvelous power of concentration. His utterances commanded the respect of all not only because of their intrinsic merit but because through them shone the righteous character of the man. Neither his intellectual nor his moral integrity was ever doubted. What he said he believed to be the truth. His sense of legal values was never dimmed or clouded by attempts to make the wrong appear the better reason. He never befogged an issue in order that out of mist and confusion a wrong result might be reached. His life may well be a model for young men entering the profession. His influence will live long after those who sought applause rather than achievement are forgotten. He was a just man, a faithful citizen, and a great lawyer. He lived a pure life. He met and discharged life's duties and responsibilities with honor, courage, and fidelity. He died leaving this world better than he found it. In the fulness of time he laid down a completed task well done. He found life's greatest satisfaction in his work, and his work will remain his most enduring monument. The memorial will be received and made a part of the records of this court.

ARTHUR LOOMIS SANBORN.

Mr. Charles F. Lamb of Madison presented the following:

May it please the Court:—The undersigned, selected by the Dane County Bar Association for the preparation and presentation to this court of a memorial to the late Judge ARTHUR L. SANBORN, ask leave to submit the following

Memorial of the Dane County Bar Association.

ARTHUR LOOMIS SANBORN was born November 17, 1850, at Brasher Falls, St. Lawrence county, New York. All of his ancestors were New Englanders, the first Sanborn having come to Massachusetts Bay in 1632. His family left New York in 1854 and came West, stopping for a short time in Ohio and then settling at Lake Geneva, Wisconsin. His father died in 1861, leaving a widow and two sons. The family remained at Lake Geneva until 1869, when they moved to Elkhorn, where ARTHUR SANBORN had obtained a position in an abstract office. In 1874 he was elected register of deeds for Walworth county, where he served two terms. During this time he had been preparing himself for the law, and on the completion of his second term he came to Madison, entering

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the Law School of the University. He obtained a position as stenographer in the office of S. U. Pinney, and after his admission to practice in 1879 he entered into a partnership with Mr. Pinney. He continued in the Law School, however, obtaining his degree with the class of 1880.

The firm of Pinney & Sanborn continued until the former's appointment to the Supreme Court of Wisconsin in 1891. Mr. SANBORN then formed a partnership with James B. Kerr. John C. Spooner, who had been succeeded in the Senate by William F. Vilas, joined the firm in 1893, which was at first Spooner, Sanborn & Kerr, and later Spooner, Sanborn, Kerr & Spooner, two of Senator Spooner's sons being successive members of it. After Senator Spooner's re-election to the Senate, Mr. SANBORN formed a partnership with L. K. Luse and Fred C. Ellis. As the firm had considerable business in Superior, an office was opened in that city with Lyman T. Powell, and for a time offices were maintained both at Madison and at Superior. In 1901 Mr. Ellis left the firm and Mr. SANBORN's eldest son became a member of it, the firm being Sanborn, Luse & Powell, and later Sanborn, Luse, Powell & de Forest. In 1903 the firm was dissolved, Mr. SANBORN and his son continuing in the office at Madison under the firm name of Sanborn & Sanborn.

In 1883 Mr. SANBORN and John R. Berryman, then State Librarian, published a supplement to the Revised Statutes of 1878, which contained all of the laws of the state of a general nature enacted since the revision. In 1889 they published, under one arrangement, a compilation of all of the general laws of the state, with annotations, which was known as Sanborn & Berryman's Annotated Statutes. In 1895 they were authorized by the legislature to prepare a complete revision of the laws of the state, which was reported to the legislature of 1897 and adopted by that body, to go into effect the following year as the Statutes of 1898, and published by Mr. SANBORN and Mr. Berryman with annotations. In 1906 Mr. SANBORN and his son, John B., published a supplement to the Statutes of 1898, including all of the general law enacted since that time and all annotations subsequent to 1898. When the office of Revisor of Statutes was created in 1911, the state purchased the annotations to the Statutes and published them in 1914. In this publication the annotations for the first 149 volumes of the Wisconsin Reports are the work of Mr. SANBORN and those associated with him.

From 1885 to 1888 Mr. SANBORN was a member of the faculty of the Law School of the University of Wisconsin, teaching the subjects of Pleading and Practice. From 1893 to 1899 he was a member of the State Board of Bar Examiners. From 1898 to 1901 he was a Commissioner on Uniform State Laws.

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Arthur Loomis Sanborn.

In January, 1905, he was appointed by President Roosevelt United States district judge for the Western district of Wisconsin and continued as such until his death, October 18, 1920. He was active in this position not only in his own district but throughout the Seventh circuit, both in the circuit and district courts and in the circuit court of appeals, where he was frequently called upon to sit. He was especially skilful in the hearing of patent cases and for some years before his death was doing a large part of the patent trial work in the circuit. In 1914 and 1920 he held the district court for the Southern district of New York, devoting most of his attention to patent cases.

He married, October 5, 1874, Alice E. Golder of Elkhorn, Wisconsin. They had four children: John B., Katherine (Mrs. Chauncey E. Blake), Eugene H., and Philip G., all of whom reside in Madison.

Judge SANBORN measured up to the highest standards as lawyer and judge. He was a student and had a profound knowledge of the law, and was an expert in practice. He possessed to a remarkable degree the ability to analyze, distinguish, and apply judicial decisions and statute law, and his prominence and success as a lawyer and a jurist were chiefly due to his natural talent in legal research combined with great industry, a judicial temperament, and a well-trained legal mind. Always patient, courteous, and approachable, clear and sound in his judgment, with a strong desire and determination to do right, his career approached that of an ideal judge. His activities were conducted in a quiet, unassuming manner, characteristic of a well-bred man conscious of his duties and responsibilities, and ever displaying dignity and innate modesty. He was a singularly likable character. His integrity was of the highest; his manner kind and gentle; his heart free from malice or guile. He was devoted to his family; a kind friend and an honored citizen. No stain rests on the docket of his life.

"To know, to esteem, to love—and then to part,
Makes up life's tale to many a feeling heart!"

WILLIAM R. BAGLEY.
CHARLES F. LAMB.
HARRY T. SHELDON.

Mr. Justice VINJE responded:

The memorial just read, in its clearness, conciseness, and adequacy, fitly symbolizes the distinguishing mental qualities of the deceased, and it leaves but little to be added by way of response to complete the picture. In keenness of mental vision Judge SANBORN had but few equals. He could see through a maze of details at a glance and single out the dominant facts, thus giving due perspective

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to the component elements of the case. No problem was too intricate for him to solve, no fact was too trivial to be overlooked, and no conclusion of his ever lacked a basis in the evidence. Cases were held in his mind as units, not as separable parts. It was this ability to view all the facts as a whole that made it appear that intuition rather than reason guided him to his logical conclusions.

United with a keen analytical mind was a deep sense of justice that never left him even as an advocate. He saw both sides of the case and was ready to do as well as to demand justice. This quality made him an ideal judge. Without a trace of egotism either in fact or in semblance, he had an inherent faith in the integrity of his own mental operations, and he always checked up the judgments of others by his own. In his mind the boundary between the known and unknown was always clearly marked, and unknown paths once trod thereafter became familiar to him. As a student of law, as a teacher of law, and as a declarer of law he seldom, if ever, lost his reckoning, because reason and judgment guided his way. The scope and duration of his legal labors made him at home in every branch of jurisprudence and he will rank high among those who shaped the early judicial history of our state.

We heartily indorse what is so aptly said in the memorial concerning his personal characteristics, and we unite with the bar in mourning one who graced equally the professions of teacher, lawyer, and judge.

The memorial offered by the Dane County Bar Association is received and will be entered upon the records of the court.

JOHN COIT SPOONER.

Mr. William R. Bagley of Madison presented the following:

May it please the Court:—The committee chosen by the Dane County Bar Association to prepare and present a memorial in this court to Hon. JOHN C. SPOONER respectfully submit the following:

Memorial of the Dane County Bar Association.

JOHN COIT SPOONER was born June 8, 1843, at Lawrenceburg, Indiana, of stanch old Puritan ancestry, the son of Philip Loring and Lydia Coit Spooner. He came in 1859 with his parents to Wisconsin and attended the public schools in Madison until he entered the State University at the age of eighteen. But he could not pursue his studies while the cause of the Union was in danger, and in 1864 he responded to his country's call and enlisted for service in the University Company, 40th Infantry Wisconsin Volun-

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teers. He was commissioned as captain when but twenty-one years of age, and when mustered out in 1866 he was rewarded by the brevet of major. He returned to his *alma mater* and was admitted to the bar in 1867. In the meantime he was private and military secretary to Governor Fairchild and obtained the title of colonel and subsequently promoted to quartermaster general.

He married Miss Annie E. Main of Madison and in 1868 removed to Hudson, Wisconsin, and opened a law office. Upon his becoming a member of the bar of St. Croix county and his appearance in the courts, he began to attract the attention of the public. His pleasing appearance, his close application to the practice of his profession, his clear presentation of his cases, in both oral argument and brief, and his splendid accomplishments as an advocate, coupled with dignity of bearing and courteous manner, rapidly made him friends and clients, and he became one of the leaders of the bar in Wisconsin; and his reputation crossed the state line into Minnesota, where his great abilities were recognized and rewarded. Within ten years he became general counsel of the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

In 1885 Mr. SPOONER was elected to represent Wisconsin in the United States Senate. A change in the political complexion of his state caused his retirement at the end of his initial term. He then took up the practice of the law in Madison with the late Judge A. L. Sanborn and J. B. Kerr.

In 1897 Mr. SPOONER was returned to the Senate, and the decade that followed was the most eventful and the most useful of his life. He was regarded as a genius in legislation and government. He was chairman of the Judiciary Committee of that powerful body for a long time. It was publicly announced by eminent authority that many important Congressional enactments emanated from him, including the Philippine and Trans-Isthmian Canal legislation. His acquaintance and relationship with those in official life, executive, legislative, and judicial, was extensive and intimate. Five times was he invited to accept a Cabinet portfolio—thrice as Attorney-General, and Presidents Harrison, McKinley, and Roosevelt each tendered him a seat in the Supreme Court. Under President Harrison he could have gone to England as ambassador. The degree of LL. D. was conferred upon him by both Yale and Columbia Universities. The opinion was often expressed, and by many keen observers of opposite political faith, that Senator SPOONER was the ablest debater since Henry Clay.

It has been written of Senator SPOONER that "while a member of the United States Senate he never had a client nor had a legal fee, although he was offered many fees of great size; but his delicate sense of honor was such that, foreseeing even the possibility

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of some interest that these clients might have in legislation, he declined services, and, in addition to that, he believed that his entire time should be devoted to the discharge of his duties as a public servant."

He resigned his seat in the Senate, a poor man, to again enter upon the practice of his profession in New York City, influenced in so doing by the desire to provide for his wife and himself in old age, and enjoyed an extensive and lucrative practice until his death.

He died in New York June 12, 1919. His wife—loyal companion for more than a half century,

> "A guardian angel o'er his life presiding,
> Doubling his pleasures, and his cares dividing,"—

and three sons, Willet M. of Milwaukee, and Charles and Philip of New York, survived him.

The light has gone out of the terrestrial life of a brilliant advocate, a great lawyer, and a statesman of pre-eminent attainments. Wisconsin honored JOHN C. SPOONER and Senator SPOONER honored Wisconsin. And it is not for us to even estimate the great value of his distinguished services to his country.

What achievement! What distinction! What heritage! To be for many years a leader in the affairs and councils of the greatest republic within the tide of time.

His name and his fame are resplendent in "The morning-star of Memory."

WILLIAM R. BAGLEY.
JOHN M. OLIN.
RUFUS B. SMITH.

Mr. Justice JONES responded:

My acquaintance with Senator SPOONER began in 1871 while I was a student in the Law School and when, although he was a young man, he was already widely known as an eloquent and able lawyer. In a little interview in the law library in the old Capitol building he manifested a very kindly interest in my future. It was a trifling incident but one which was never forgotten by me, and in after years I knew and heard enough of him to know that such acts and greater acts of kindness had marked his pathway through life and had attached to him thousands of younger men.

In this tribute there can be little more than mention of the important causes in which he participated. Before he was thirty years of age he was retained by Governor Washburn for the state in the case of *Schulenberg v. Harriman,* reported in 21 Wallace, in which he successfully contended for a rule of law as to the forfeiture of land grants which became of vast significance in our jurispru-

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dence. In the seventies there was no litigation pending in the Northwest involving greater financial interests than that in which the railroads were engaged in respect to the Congressional land grants and their distribution. Mr. SPOONER represented the North Wisconsin Railway Company, afterward the Omaha Company. Many of the most distinguished lawyers of this and other states represented other railroads. There were infinite complications and many theories advanced, and probably no company received all it claimed; but it was the tradition among lawyers that the view advocated by Mr. SPOONER was more nearly followed by the court than any other.

He was also successful in his conduct of the famous Gerrymander cases, cases of great importance in the political history of the state.

When the Northern Pacific Railroad Company became insolvent, having property in seven or eight states and receivers in various districts, it was largely Mr. SPOONER's resourcefulness that brought harmony out of chaos.

When Mr. SPOONER entered the United States Senate he carried with him the prestige of being one of the most distinguished lawyers of the Northwest. There is a kind of brotherhood among eminent lawyers which binds them together irrespective of race or religion or politics. The leading lawyers of the Senate without any long personal acquaintance saw that in their young colleague they had one of their peers. This was enough to give him very soon a conspicuous place among the leaders of that body.

Senator SPOONER was equally at home in a hotly-contested jury case, in an argument on constitutional questions before the highest court, and in a running debate in the United States Senate. It is rare indeed that such a combination is found in one person. Erskine was *facile princeps* the leader of the English bar, but his parliamentary career was a disappointment to his friends. It is not uncommon in this country for lawyers to win considerable distinction as Congressional leaders and yet to have but mediocre standing at the bar. If in early life Senator SPOONER had commenced his legal career in New York City, his industry and his talents would have easily entitled him to rank with such leaders of the New York bar as Joseph H. Choate, James C. Carter, and Elihu Root. Fortunately for us he chose his own state for his field of labor. Our State University owes him a lasting debt of gratitude. During his single term as a member of our legislature he drafted and urged to passage a bill levying a general state tax to be added annually to its income. He was afterward a Regent, and always proud to be called a son of our University.

Although his journey through life was one of arduous toil it was congenial toil, and his genial nature, his love for his family

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John Coit Spooner.

and for his fellow men, made it a happy journey. It was a life crowded with great events. He was one of the army of volunteers in the Civil War. He became one of the brightest ornaments of the Wisconsin bar. For eighteen years he represented his state in the Senate of the United States. There he won the admiration and affection of his colleagues and bore so conspicuous a part that Wisconsin was proud of her gifted son.

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CASES DETERMINED

AT THE

January Term, 1921.

BONNIWELL, Administrator, Respondent, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Appellant.

March 9—April 5, 1921.

Electricity: Degree of care in handling: Boy climbing tower carrying transmission lines: Negligence: Reasonable anticipation of injury: Trespassers and licensees: Evidence: Customary mode of construction: Contributory negligence.

1. In dealing with so dangerous and mysterious an agency as electric wires, a public utility maintaining a high-tension transmission line must use a high degree of care to avoid injury to persons who are lawfully liable to come in contact with the wires.
2. In an action for the death of a boy who climbed a tower carrying electric wires and was killed by a wire strung on poles near the tower, the testimony of one of defendant's employees that he did not know of any other place on the line where a wire approached within fifteen inches of the tower at a point within thirty-five feet from the ground was not equivalent to a statement that the arrangement of the wires departed from the usual mode of construction.
3. A company maintaining high-tension electric lines which also owned other wires strung on wooden poles which at one point were within twelve or fifteen inches of the corner of one of the towers was not bound to anticipate that a boy would climb the tower to a height of thirty feet, circle around it on the narrow crossbars and take hold of such wire near the tower in reliance on the fact that it was "padded," though it knew boys played in the field where the towers were, where it was shown that its employees had never seen boys on the towers and no other child had ever attempted to perform such dangerous feat. *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, distinguished.

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4. A boy climbing one of the towers to a height of thirty feet and circling it on the narrow crossbars was a trespasser, and the company owed him no active duty of protection, whether or not he was a licensee while playing at the foot of the tower.
5. Owners of private property are not insurers against all accidents which may happen on their premises by reason of dangerous agencies thereon.
6. A boy eleven years old of average intelligence was negligent as matter of law in climbing and circling one of the towers where they bore danger signs plainly visible and he had been warned of the danger by his father and just before the accident was warned by a companion.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action to recover damages for the death of plaintiff's minor son. Trial before a jury resulted in judgment for plaintiff upon a special verdict. Defendant appeals.

The deceased boy, Clarence F. Bonniwell, Jr., was about eleven years and four months of age at the time of the accident. He attended school and was in the third or fourth grade. The school was about two and one-half miles from Clarence's home, and about half way between was the "Nashota" stop and shelter station on defendant's electric interurban line at a point where it was crossed by a road. It was in a farming district. Along the interurban right of way there was also placed defendant's high-tension transmission line, consisting of wires carrying 66,000 volts strung upon steel towers about fifty-seven feet high constructed of uprights and cross-braces. There were also the trolley wires and certain other wires supported by rows of ordinary wooden poles on either side of the tracks and about half as high as the towers.

Near this "Nashota" stop the line changed directions and there was a triangular field a few hundred feet in both dimensions lying on one side of the interurban tracks and in which were placed three of these towers. Each tower bore one sign in black letters on a red field, reading "Danger, High Voltage." Each had ladder steps on one corner start-

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ing about eight and one-half feet from the ground. This piece of land belonged to defendant and was inclosed, with the tracks, by a woven-wire fence with a strand of barbed wire on top. Entrance could be had to it, however, from the road crossing by passing over the cattle-guards, and also from the adjacent roads at one or two points where there were holes in the fence large enough for boys to get through. There were one or two paths across the field from the tracks to these holes, worn by school children and others.

Clarence and other boys frequently walked on the tracks from and to school, and not infrequently played in this triangular field. Defendant's employees on passing cars had seen them there and had not ordered them off. The boys had also at times climbed the towers a few feet and performed gymnastic exercises upon the cross-braces. There was no evidence, however, that any had climbed above the point where the ladder commenced or that any employee of defendant had ever seen boys on the towers. The boys understood that there was danger from wires higher up on the towers; Clarence had been warned of them by his father and other boys.

On the day of the accident Clarence with other boys had been given a ride from school to the neighborhood of this field. Here he and Edwin Pfister, a boy twelve years of age, got off to continue in the direction of their homes, while the other boys continued to ride in another direction. Somewhat aimlessly the two boys entered the field. The evidence differs as to whether they entered through a hole or over the cattle-guards. What happened after this is described by Edwin alone. He testified that Clarence said the towers were not as high as their windmill which he had climbed many times and that he wanted to climb a tower. Edwin asked him not to do so, but he "shinned" up and pulled himself up by the cross-braces to the ladder, consisting of iron spikes or foot-rests, and then climbed up further, circling the tower twice on the cross-braces as he came to them on

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the way up. As he was making a circuit on some of the cross-braces at about half the height of the tower, he came near one of the wires strung on the wooden poles. The wire carried nominally 3,300 volts and came within twelve or fifteen inches of the tower at one of the corners away from the ladder. To prevent arcing between it and the tower as it swung in the wind, a piece of rubber tubing about three feet long had been placed about the wire at this place and wound with tape. This was defendant's customary method of preventing arcing at places where the wire came close to other objects. It did not afford safe insulation for a person to handle the wire, nor was it intended as such.

At this point Edwin testified that Clarence said: "Here is the feed wire, I guess." Edwin asked him to come back or away from it, but he said: "It is padded." Edwin said: "Even so, come back," or, "Never mind the padding, come on back," but Clarence took hold of it. He received a severe shock and burns from which he died four days later.

The jury by their special verdict found negligence on the part of defendant and that there was no contributory negligence. Judgment was rendered for the plaintiff.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Carl Muskat.*

For the respondent there was a brief by *Austin, Fehr, Mueller & Gehrz* of Milwaukee, and oral argument by *Arthur A. Mueller.*

JONES, J. This is one of a class of cases which must always appeal strongly to the sympathy of every one cognizant of the facts. A bright, spirited boy, full of the buoyancy of youth, thoughtless of danger, undertakes a too hazardous venture and comes to his untimely death. We are confronted with the question whether upon the record and the facts proved the verdict can be sustained and the owner of the property on which the accident happened can be held responsible.

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The grounds of negligence on the part of the defendant which are relied on are that the trolley poles, steel towers, and spikes or foot-rests were attractive and alluring to children; that the fence was out of repair; that children had been allowed to play on the land of defendant and had loitered about the towers and poles as defendant knew; that one of the towers was within 100 feet from a pathway; that the high-tension wire which the boy touched was so strung upon the wooden poles that it passed within easy reach of the steel tower; that defendant had failed in its duty to so manage its current as to protect children, and to so construct and operate its towers and wires that it would be impossible for children of immature age to reach the wires; to use properly insulated wires; and generally to take such other precautions as would have been adequate to prevent the boy from coming in contact with the wires.

The defendant was bound to use that degree of care which was reasonably adequate to meet and avoid the dangers which ought to be anticipated under the circumstances. In dealing with so dangerous and mysterious an agency as electric wires, it is evident that persons in their management must use a high degree of care to avoid injury to those who are lawfully liable to come in contact with them. *Nagel v. Hake,* 123 Wis. 256, 101 N. W. 409; *Wilbert v. Sheboygan L., P. & R. Co.* 129 Wis. 1, 106 N. W. 1058.

In this case there was no proof that before this unfortunate accident any persons except the employees of defendant had ever attempted to climb any of the towers in question. The foot-rests or spikes, called ladders, were eight and one-half feet from the ground. It is true that boys had climbed as high as the first cross-bar and the lowest foot-rest of the ladder, about seven and one-fourth and eight and one-half feet, respectively, above the ground, and had swung upon the cross-bar. The towers were of standard construction, and the only difference suggested is based on the testimony of an engineer, employee of defendant, who on cross-examination was asked this question: "Do you

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know of any other place on the line from West Allis to Kilbourn where a wire approaches within fifteen inches of the tower, at a point within thirty-five feet from the ground?" and answered: "I don't know of any." This was hardly equivalent to a statement that the arrangement of wires at this point departed from the usual mode of construction. It is argued that this partial insulation which was used to prevent the arcing of the current from the wire to the tower when the wire was swayed by the wind should have been made a complete insulation or that there should have been an extra sign and warning that it was dangerous.

This brings us back to the question whether the defendant was reasonably bound to anticipate that boys would climb to a height of about thirty feet by circling around upon the narrow cross-bars. The case most relied on by respondent's counsel is *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, 138 N. W. 1008. In that case there was a lumber pile about twenty-four feet high, easy of access for children by steps of projecting boards. It was adjacent to a much traveled private road, did not belong to defendant and was not on defendant's property, and large numbers of children, as defendant knew or ought to have known, had long been accustomed to play upon the lumber pile. A boy playing on the lumber was killed by contact with sagged electric wires very defectively insulated, twenty-one inches above the top of the lumber. Defendant had been notified of the condition of the wires and poles eight months before the accident. The wide distinction between that case and the instant case seems to us too obvious to call for discussion. Another case cited and quoted by respondent's counsel and one more analogous to the present case is *New York, N. H. & H. R. Co. v. Fruchter,* 271 Fed. 419. In that case a boy climbed upon some portion of a bridge which had some apparatus of electric wires on top, and was injured. It does not appear how difficult a feat it was for the boy to climb to the height of the wires. Although the rule is different

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in New York where the accident happened, the court felt bound to follow the rule of the federal court as declared in *Railroad Co. v. Stout,* 17 Wall. 657, which is recognized as the leading case declaring the turntable or attractive-nuisance doctrine. In the case of *Zartner v. George,* 156 Wis. 131, 135, 145 N. W. 971, Mr. Justice VINJE used this language:

"Shall the doctrine of the *Turntable Cases,* or of attractive nuisances, in its widest scope be applied to the conduct of ordinary business carried on in a customary manner upon private property? It has not yet so been applied in our state." See, also, *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223; *Bruhnke v. La Crosse,* 155 Wis. 485, 144 N. W. 1100.

We are not prepared to apply the doctrine in this case. The rule laid down in *Railroad Co. v. Stout, supra,* has been much criticised, and has been rejected in many states. In some cases it has been asserted that modern tendencies are toward a restriction rather than an extension of the rule there declared. 20 Ruling Case Law, 81; 19 L. R. A. N. S. 1106.

There are several important facts which distinguish this from any case cited by respondent's counsel. There was no proof that other children had performed or attempted the dangerous feat undertaken by Clarence. When the injury happened he was in a position not easily accessible to children. He met with the injury while engaged in an unusual and extraordinary act. It is argued by respondent's counsel that Clarence was a licensee and entitled to the degree of care which that relation requires. It is not necessary to decide whether he was a licensee while playing at the foot of the tower. But it seems very clear to us that while circling the tower and climbing to the height he reached he was a trespasser and that defendant owed no active duty to protect him in the act he was attempting. *Wendorf v. Director General of Railroads,* 173 Wis. 53, 180 N. W. 128.

The owners of private property, whether they be the owners of homes, business places, or traction lines, cannot be

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held insurers against all accidents which may happen on their premises. The consequences which would result from holding the owners of property to the extreme degree of care insisted upon in this case are well pointed out in two opinions by Mr. Justice VINJE in *Zartner v. George,* 156 Wis. 131, 145 N. W. 971, and *Emond v. Kimberly-Clark Co.* 159 Wis. 83, 149 N. W. 760.

We hold that the defendant was not bound to anticipate that a child or children would climb the tower in such a manner as to be endangered by its wires, and that the question of the negligence of defendant should not have been submitted to the jury.

Was there such contributory negligence as should prevent a recovery? Clarence was a boy over eleven years old, of average intelligence. He must have known that the circling of the tower alone was attended with some danger. The statement of facts shows that he knew the dangerous character of electric wires. He had been warned by the danger sign plainly visible on the tower, by his father, and soon before the accident was warned by his companion. Nevertheless he grasped the wire relying on the fact that it was "padded" and assumed that it was not dangerous. Although we give due consideration to the fact that the rules as to negligence applying to children and adults are quite different, we are forced to the conclusion that on the plaintiff's own showing on the uncontradicted evidence, and as a matter of law, contributory negligence was the direct cause of the death.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

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STATE EX REL. BADGER TELEPHONE COMPANY and another, Respondents, vs. ROSENOW, Appellant.

March 9—April 5, 1921.

Corporations: Articles of organization: Conflict with statute: Election of officers.

Under sec. 1776, Stats., providing that the directors of stock corporations "shall choose one of their number president and such other officers as the corporate articles and by-laws require," all officers designated by the articles or by-laws are to be elected by the directors, and a provision of the charter or articles of organization of the corporation for their election by the stockholders is in conflict with the statute which governs the election.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed. Mandamus.*

For the appellant there was a brief by *Shannon & Cronin* of Oconomowoc, attorneys, and *Sawyer & Sawyer* of Hartford, of counsel; and the cause was argued orally by *T. T. Cronin* and *A. D. Shannon.*

For the respondents there was a brief by *Russell & Foote* of Hartford, and oral argument by *J. J. Foote* and *J. C. Russell.*

ROSENBERRY, J. By consent of the parties the allegation of the answer that sec. 2, art. 4, of the charter of the relator company provides that officers of the company shall be elected by a majority vote of the stockholders present at the annual meeting was to be treated as a part of the petition and the petition will be regarded as amended in that particular. The relator *Damschen* was elected secretary-treasurer of the company at a meeting of the stockholders. The defendant *Rosenow* claims that the charter conflicts with the statute, that the statute controls, that the election of *Damschen* was illegal, and that he is entitled to continue in office

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until his successor has been elected and duly qualified. The relators brought this action to compel *Rosenow* to surrender the office.

The real question is whether or not the provisions of sec. 2 of art. 4 of the charter of the corporation are in conflict with sec. 1776 of the Statutes, which is as follows:

"The stock, property, affairs and business of every such stock corporation shall be under the care of and be managed by a board of directors who shall be chosen annually by the stockholders from among their number, at such time and place as shall be provided by the articles of organization or the by-laws, and shall hold one year and until their respective successors are chosen, except that when classified by the articles of organization they may be elected and hold accordingly. The directors shall choose one of their number president and such other officers as the corporate articles and by-laws require, for such term as shall be prescribed thereby; and may fill any vacancy in their board, happening after any regular annual election, until the next succeeding election."

The relators claim that the language, "the directors shall choose one of their number president and such other officers as the corporate articles and by-laws require," should be construed as if it read, "the directors shall choose one of their number president and such other officers as the corporate articles and the by-laws may require the directors to choose," leaving it to the articles to determine whether the officers should be chosen by the stockholders or by the directors. We think this is not a correct interpretation of the statute.

This clause of sec. 1776, with but a single change, has been in force in this state since 1853 (sec. 8, ch. 68, Laws 1853). The clause originally read:

"The directors of every such corporation shall choose one of their number to be president, and shall also choose a secretary and treasurer, and such officers as the by-laws of the corporation shall prescribe."

This clause was repeated verbatim in the Statutes of 1858 (sec. 8, ch. 73). In ch. 144, Laws 1872, it appears in its present form. From a consideration of the statute as origi-

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nally written it is plain that it was the intent of the legislature to vest the power to choose the officers of a corporation in the board of directors. It was apparently rewritten for the purpose of condensation only. It was the intent of the legislature to require the directors to choose one of their number president and to vest in them the power to choose such other officers as the corporate articles and by-laws might designate. Under the statute the power to elect officers is conferred upon the directors. It is the function of the corporate articles or by-laws to prescribe and designate what officers shall be elected. When designated they are to be elected by the directors. The provision of the charter or articles of incorporation being in conflict with the statute, the statute governs and the stockholders were without power to elect the officers.

The power to elect officers is generally vested in the board of directors of a corporation. 14A Corp. Jur. § 1815; 2 Cook, Corp. (6th ed.) § 603. As amended, the petition stated no cause of action.

By the Court.—Judgment of the circuit court reversed, and cause remanded with directions to dismiss the action.

STATE EX REL. HATHAWAY and others, Appellants, vs. MIRLACH and others, Respondents.

March 9—April 5, 1921.

Municipal corporations: Industrial education: Requirements of vocational school: Determination by local board: Levy by common council: Mandamus: Relief unavailable when appeal is decided: Jurisdiction.

1. Under sub. (1), (2), sec. 41.16, Stats., the common council of a city was not required to levy a tax of 1.5 mills for the requirements of the vocational school of the city as requested in the report of the local board of industrial education, but was required to levy a tax to raise an amount which, when added to the funds otherwise available for such purposes, would equal the requirements fixed by the board.

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2. The authority conferred by secs. 41.13 to 41.21, Stats., necessarily implies that the governing boards (the state board of vocational education and the local board of industrial education) are vested with the power to determine what amount shall be contributed for the support of the schools by local taxpayers, within the limitation of 1.5 mills prescribed by the legislature.
3. Where at the time the circuit court quashed an alternative writ of *mandamus* relief thereby was available, this court on appeal obtained jurisdiction to determine all questions involved in the litigation, though the peremptory writ of *mandamus* as prayed for is of no avail at the time of the appeal.

APPEAL from an order of the circuit court for Dodge county: OSCAR M. FRITZ, Judge. *Reversed.*

The appeal is from an order quashing an alternative writ of *mandamus* issued by the court.

The plaintiffs in this action constitute the local board of industrial education of the city of Beaver Dam, Wisconsin. Upon verified petition an alternative writ of *mandamus* was issued commanding the defendants, the mayor and city council of Beaver Dam, to levy and collect a tax of 1.5 mills. The defendants moved to quash the writ, and, upon motion, the plaintiffs were allowed to amend the petition and writ, setting forth, among other things, that prior to the filing of their report and requisition with the proper officers of the city of Beaver Dam they had, at the regular meeting of the board, determined the requirements of the vocational school for the city of Beaver Dam for the fiscal year at the sum of $14,361.66; that this sum was and is required for the support of the school established in the city of Beaver Dam under secs. 41.13 to 41.21, Stats.; that the assessed valuation of the taxable property in the city was $8,806,020; that the requested levy of 1.5 mills is less than the requirements of the schools but is the maximum amount allowed by law; that the sum levied by the defendants, $5,724, together with other funds provided by law and placed at the disposition of the city, is not sufficient to meet the requirements of the plaintiffs for the purposes mentioned, and that if this levy

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is allowed to stand the plaintiffs will not have sufficient funds to carry on the vocational school and that it will be necessary to close the same before the end of the year; that the proper tax which should have been levied amounts to $13,209.03. It is further alleged that the common council acted upon the report and requisition thus made and made an allowance and levy of $5,724; that this amount is insufficient; that the tax roll had not been delivered to the treasurer of the city of Beaver Dam for the collection of taxes for the year 1920; and prayed that the same might be corrected so as to include the proper amount of tax as required by the local board.

The defendants moved to quash the petition and writ as amended, which motion was granted and an order entered thereon. At the time of the entry of said order the tax roll had not been delivered to the city treasurer. Appeal is taken from the order quashing the writ and from the whole thereof.

For the appellants there was a brief by *Clark & Lueck* of Beaver Dam, attorneys, and *William J. Morgan,* attorney general, and *E. E. Brossard,* assistant attorney general, of counsel; and the cause was argued orally by *Mr. Royal F. Clark* and *Mr. Brossard.*

John C. Healy of Beaver Dam, for the respondents.

SIEBECKER, C. J. Did the circuit court err in quashing the writ of *mandamus?* The petition alleges that the relators are the local board of industrial education for the city of Beaver Dam and that this board, under the provisions of secs. 41.13 to 41.21, Stats., at a regular meeting determined what amount the vocational school of the city of Beaver Dam required for the fiscal school year of 1920-1921 to support and maintain it. The board reported to the common council of the city that the sum of $14,361.66 would be required for this purpose and for the purchase of necessary additions to school sites, building operations, fixtures, and supplies. They therefore requested the common council

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to levy a tax of 1.5 mills to raise this fund for such uses for the fiscal year specified in their report and requisition. It also appears that the common council levied a tax to raise the sum of $5,724 for these purposes, which could be applied in addition to other funds provided for by law and placed at the disposition of the city. It is alleged that such levy is much less than the amount that would have been realized had the city council levied the 1.5 mills tax on the assessed valuation of the city property for taxing purposes. It is also alleged that the sum thus raised by a tax levy, together with other funds provided by law and placed at the disposal of the city for the same purpose, is wholly insufficient for the support and maintenance and necessary equipment for such school for the current fiscal year. The plaintiffs assert that their requisition and demand that the city council levy a tax on the city property to provide the amount they reported for such school purposes was wrongfully refused by the city council. The issues thus raised by the parties require an interpretation of sub. (1) and (2), sec. 41.16, Stats. Sub. (1) provides that the local board of such school "shall report to the common council, . . . at or before the first day of September in each year, the amount of money required for the next fiscal year for support of all the schools established or to be established under secs. 41.13 to 41.21 . . . and for the purchase of necessary additions to school sites, building operations, fixtures and supplies." Sub. (2) provides that there shall be levied ". . . a tax upon all the taxable property" of any such city in the manner and at the time other taxes are collected, "which together with the other funds provided by law and placed at the disposal of said city" for the same purpose "shall be equal to the amount of money so required by said local board of industrial education" for the purposes of establishing, maintaining, and operating the schools provided for by the statutes. It is made the duty of such school board to ascertain before September 1st of each year the amount of money so required

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for the ensuing school year. The terms of the statute do not expressly provide that such report shall contain anything besides the amount of money required to carry on the school; nor is there anything in the statute which by necessary implication demands that the board shall specify any other items in such report. The duties of the school board are therefore discharged in this respect when it makes this report to the common council. The statutes, sec. 41.13 to 41.21, creating the state board of vocational education, the local board of industrial education for the purposes of establishing and maintaining vocational schools for instruction in trades and industries, commerce and household arts, and imposing the burden on cities, villages, and towns to provide the necessary revenue to carry them on, are all expressed in positive terms requiring that such schools be established and maintained as prescribed. The act expresses a manifest legislative intent that municipalities shall by taxation provide the funds needed in addition to the amount otherwise provided by law to carry out the purposes of the act, and the state and local boards are given the power and authority to establish, maintain, and operate the schools. The authority so conferred necessarily implies that these governing boards are vested with the power to determine what amount should be contributed for such purpose by the local taxpayers within the legislative limitation of 1.5 mills. It is claimed by the respondents that the local board failed to report and specify to the city council the amounts available for such school purposes provided by law and placed at their disposal for the fiscal year covered by their report from the following sources, namely, moneys derived from (1) state aid; (2) sale of products in manual training and domestic science departments; (3) tuition fees; and (4) federal aid. There is no direction in the statute that the local boards shall include a specification of these items in their report. The language of the statute is that the local board "shall report to the common council . . . the amount

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of money required for the next fiscal year" for such school purposes. The petition shows that the board did this and thus fully complied with their duty under the statute. Obviously the legislature left it to the common council to ascertain what funds, other than those to be raised by taxation, are available under the law for this purpose for any fiscal year, and when this has been ascertained by the city council they are required to raise by taxation the additional fund required to make up the amount the local board has reported to the council as requisite for this purpose. From this it follows that the common council of the defendant city was not required to levy a 1.5 mills tax for such purpose as requested in the report of the petitioners, but that the city council was required to levy a tax to raise an amount which, when added to the funds otherwise available for such purposes, would equal the requirements fixed by the board, namely, the sum of $14,361.66. The facts alleged in the petition are sufficient to show that the common council did not comply with the statutes in this respect and that it states a good cause of action, and that a writ commanding the officers of the defendant city to perform their duty in levying a tax as required by sub. (2), sec. 41.16, Stats., should have been issued. Obviously the tax roll for the year 1920 has been in the hands of the city treasurer for collection of the taxes for that year, and no additional tax can now be put on that roll. At the time the circuit court quashed the writ in this case such relief was available. Under such circumstances, this court on appeal obtained jurisdiction to determine all the questions involved in the litigation, though the peremptory writ of *mandamus* as prayed for is of no avail at this time. The relators are entitled to a reversal of the order appealed from and to recover their costs and nominal damages. *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482.

By the Court.—The order appealed from is reversed.

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DOUGAN, Appellant, vs. H. J. GRELL COMPANY, Respondent.

March 9—April 5, 1921.

Landlord and tenant: Independent leases: Property to be devoted to certain uses: Necessity of continuous user: Trade fixtures: Disclaimer in pleading: Force and effect: Costs in equity cases: Discretion of court.

1. A lease of land to be used for the purpose of manufacturing butter, executed in 1894, and a lease five years later of a small piece of land for the purpose of providing a residence for the butter-maker, are independent agreements, and provisions contained in the second lease relating to re-entry could not be construed as though contained in the first.
2. A clause in the lease providing that the leased premises were to be used for "the purpose of residence for butter-maker" cannot be construed to contain an implied covenant that there was to be a continued possession of the dwelling house by one who was a butter-maker.
3. Where buildings were placed on the leased premises by the tenant and continuously assessed as personalty and the taxes paid by the tenant, who also kept the buildings insured, the structures erected and the machinery contained in the buildings being suitable for and devoted to business purposes, the tenant, although there be no express stipulation in the lease, had the right to remove all of such fixtures and the machinery contained in them at or before the lawful expiration of his term.
4. In an action by the lessor to forfeit the lessee's title and interest, a disclaimer by the lessee, in its notice of a proposed auction sale of the leasehold interest and in its pleadings, expressly reciting that a certain dwelling house on the leased premises was not to be removed by it, is binding on the defendant lessee.
5. In an equitable action by the lessor to declare a forfeiture of the lease, the trial court is *held* not to have abused its discretion to award costs in whole or in part pursuant to sub. (7), sec. 2918, Stats., it having awarded them to the defendant lessee in a limited amount.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The plaintiff's predecessor in title of a farm about seven miles south of Beaver Dam, six miles from Columbus, in a

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dairy community in Dodge county, on October 31, 1894, made a written agreement with Charles Christians and J. W. Puerner whereby there was leased to them for ninety-nine years at an annual rental of $5 about one half of an acre from the northwest corner of the farm. Two copies of such lease were signed by the respective parties. Each copy contained the following: "said premises to be used only for the purpose of manufacturing butter and cheese." In the copy of lease retained by the lessees this provision immediately followed the above quotation: "with the privilege of erecting buildings suitable for that purpose."

Shortly afterwards a factory building about 20 by 40 was erected on a stone foundation which extended a foot and a half into the ground. Subsequently a receiving station was added and a cement floor laid beneath the entire factory building. A barn was also moved onto the premises and placed upon a similar stone foundation.

On January 2, 1899, a similar lease was made to Charles Christians alone of a strip of land forty feet in width alongside the factory premises, also at a rental of $5 per annum. This lease contained a provision: "said premises to be used for the purposes of a residence for butter-maker," and also the following provisions:

"If the lessee shall underlease the said premises . . . without the consent of the lessor, then the lessor may expel the lessee from the premises forthwith," and "If the party of the second part . . . shall use said premises, or any part thereof, contrary to the conditions herein contained, . . . this lease shall be void as to the party of the second part, and the party of the first part . . . shall be entitled to the immediate possession of said premises without hindrance or delay."

A house about 26 by 16 was built on a stone foundation. There are other buildings on the two pieces of land without substantial foundations.

The defendant came into possession of the premises by subsequent assignments from the lessees. For about two

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and one-half years prior to December, 1920, the time of the trial, the factory and the other buildings were not used for any purpose whatsoever. On January 17, 1920, the defendant made a verbal lease with one Edward Maasche, who was employed on one of the neighboring farms, for the use of the dwelling house at the rate of $5 per month.

The buildings on the premises have been assessed as personal property and taxes thereon have been paid by the lessees, who have also kept the buildings insured.

May 5, 1920, the defendant sent to plaintiff a check for $10 for the purpose of paying the rent then due for the two separate pieces of land.

May 8, 1920, the plaintiff wrote to the defendant returning the ten-dollar check and saying as follows:

"You have violated the terms of the lease dated October 31, 1894, made between my father, Samuel W. Dougan, and Charles Christians and John W. Puerner, by failing to use the premises described in that lease for the purpose of manufacturing butter and cheese. You have also violated the terms of the lease dated January 2, 1899, made between my father, S. W. Dougan, and Charles Christians, in that you have failed to use the premises therein described for the purpose of a residence for butter-maker. By reason of such violations, I now declare both of said leases forfeited and of no further force or effect."

Public notice was given by the defendant by posting of bills in the neighborhood of the premises, the material parts of which notice are as follows:

"*Auction!* The undersigned will sell at public auction the cheese factory and barn with contents, also good house, on Frid. May 14, . . . on the premises. House carries with it a lease of ninety-nine years and is in good condition. The factory buildings contain a large amount of good lumber. Machinery, etc. The sale will also include a twenty h. p. boiler and bridging, milk cans, Twentieth Century milk heater, pump, piping, shafting, pulleys and hangers, milk scales, steam milk tester and odd lots of cheese factory and creamery supplies. . . . Creamery buildings must be moved but not the house. . . . H. J. GRELL CO., Props."

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Before the time for such sale plaintiff commenced this action, asserting in substance the facts concerning the leases as above stated, that there had been no use of the factory or buildings for some time, and that the premises had been abandoned for the purposes for which the lease was entered into. As to the dwelling house, that it was the intention of the parties to make it a permanent fixture to said land and that the said dwelling is now a part of the real estate; that it had not been used for more than two years prior to the commencement of the action as a residence for butter-makers. Recites the sending of the letter by plaintiff as above stated; that defendant claims ownership of the factory building, dwelling house, and other buildings on the premises and threatens to sell the same; and sets out in full the notice of auction as specified above; that to permit the defendant to so sell or remove any or all of said property from the premises and the permanent fixtures thereon will cause irrevocable injury to the real estate; that the occupancy of the dwelling house by one not a butter or cheese-maker is without plaintiff's consent and a violation of the terms of the lease of January 2, 1899.

Plaintiff demanded judgment, first, that by reason of defendant's acts above recited it should be adjudged to have forfeited all of its title and interest to each of the said leases and that they should be declared null and void; second, that the court determine what of the machinery or property described in said notice of sale are permanent fixtures, and that the court determine that the boiler, bridging, pump, and other articles are all permanent fixtures; and third, that the defendant be enjoined and restrained from removing or attempting to take possession of the factory buildings, barn, house, or any of the permanent buildings on the real estate, or of the permanent fixtures in the factory.

Defendant by answer denied that there was any intention at the time of the construction of the factory building to make it a permanent fixture. Denies abandonment of the

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premises, and alleges that it continued to pay rent upon the premises which had been accepted by the plaintiff. It also makes similar allegations as to the dwelling house; admits the receipt of the letter of May 8, 1920, above set forth; admits that it asserts and claims that it is the owner of the factory building and house and the machinery contained in the buildings and on the premises; admits the posting of the notices of sale and that it does intend to sell the factory, barn, and machinery and furniture in and upon said premises except the house, and asserts that it is its right so to do under the said lease.

The action was tried by the court without a jury. Findings of fact were made as to the leases aforesaid, of abandonment of the premises for the purpose of manufacturing cheese and butter, the failure to use the dwelling house as a residence for a butter or cheese-maker, the verbal lease of January 17, 1920, to Edward Maasche; the writing of the letter of May 8, 1920; that the defendant gives out and threatens that it will remove all the buildings and sell the same. Also the following, being the only finding of fact to which exceptions were filed by plaintiff, to wit:

"Seventh. The buildings can be removed from the premises described in both of the leases and the premises left in their former condition as existed prior to the erection of the buildings."

The conclusions of law were as follows:

"First. That as to the premises described in both of the leases there is no right of re-entry for mere nonuser of the premises.

"Second. That as to the premises described in the lease of January 2, 1899, the plaintiff has waived the breach, if any, of the covenant relating to subletting by assigning as the reason for the cancellation of the lease that defendant had failed to use the premises for the purpose of a residence for a butter-maker.

"Third. That the defendant is entitled to remove the buildings on the premises described on both leases at any time before the expiration of the term of the lease; that

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judgment should be entered dismissing the complaint and without costs to either party except that the plaintiff shall pay the fees of the clerk of the court."

From judgment entered in accordance therewith the plaintiff has appealed.

For the appellant there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *A. W. Lueck.*

Martin J. Brennan of Milwaukee, for the respondent.

ESCHWEILER, J. The appellant contends in effect that in determining the respective rights and liabilities of the parties, the two leases, the one for the factory premises and the other, made five years later, for the forty-foot strip on which the dwelling house was erected, should be construed as one document, and that whatever additional rights were given to the lessor by the language of the second lease over that contained in the first should be construed as though so contained in the first lease. In support of such view it is urged that the nature of the property included in the lease; the merely nominal rent of $5 per annum for each; the evident value to the then lessor, the owner of a farm in a dairy community, in having such a factory so accessible to his farm; the mention in the second lease that the premises are to be used for the purposes of a residence for a butter-maker, all indicate that the parties to such several instruments intended them to be one lease and for one purpose.

Further, that then, when so construed under the forfeiture clause appearing in the second lease and quoted above, giving the lessor the right to re-enter in case the lessee used said premises or any part thereof contrary to the conditions contained in the lease, together with the conceded facts that there had been no use of the premises for the purpose of manufacturing butter and cheese for over two years and that the dwelling house had been rented to one who was not a butter-maker, there was sufficient to authorize the plaintiff as lessor to effectually give the notice of May 8, 1920, above

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set forth, and thereby there was a re-entry by him and a consequent loss to the lessee of his right to remove, if any such he had, any of the buildings, machinery, or equipment on the premises.

We are satisfied that the trial court was correct in holding that the two leases of 1894 and 1899, respectively, were separate and independent agreements as to separate and independent pieces of property. He was also correct in holding that each of such leases must stand or fall upon its own terms and conditions.

In the first lease it was provided: "said premises to be used only for the purpose of manufacturing butter and cheese." Plaintiff contends that such language, in view of the surrounding circumstances, amounts to an implied covenant that there should be for the period of the lease a continuous carrying on of the manufacture of butter and cheese upon said premises.

What effect such language might have in case of any attempted use by the lessees of the premises for some other purpose than that of manufacturing of butter and cheese it is not necessary to consider. It is plain, however, that such language cannot be properly construed to imply an undertaking or obligation on the part of said lessees or their successors in interest that there should be continuously kept up for a period of ninety-nine years such butter and cheese industry. It can amount to no more at the most than to prevent the lessees from using the premises for some other than that purpose, but does not impose upon them the much greater liability and obligation of continuously carrying on the specified industry. *Henry Rahr's Sons Co. v. Buckley*, 159 Wis. 589, 150 N. W. 994; *Brugman v. Noyes*, 6 Wis. 1; *Polcbitzke v. John Week L. Co.* 157 Wis. 377, 383, 147 N. W. 703. The lessees' failure, therefore, to continue such industry was not a breach of any express or implied condition of the lease and worked no forfeiture. The notice, therefore, of May 8, 1920, given by the plaintiff by his letter

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claiming such alleged forfeiture was of no avail and he had no cause of action as against the defendant by reason of such failure so to use the factory premises.

The same situation is presented and the same ruling must follow as to the clause in the second lease contained, "said premises to be used for the purposes of a residence for butter-maker." Such provision cannot be construed to contain an implied covenant that there is to be a continued possession of such dwelling house by one who is a butter-maker.

The plaintiff has based his cause of action in this lawsuit upon alleged forfeiture of defendant's leasehold interest in the premises on the ground set forth in lessor's notice of May 8, 1920, *supra,* and not upon an alleged forfeiture by reason of any other terms or conditions of the leases, and his complaint was predicated upon the rights he claimed existed by reason of such notice and not otherwise, and he must stand or fall thereby. The trial court therefore was correct in his disposition of this matter in that regard.

As to the buildings on the factory premises, the court by its seventh finding determined as to those buildings as well as to the dwelling house that they could be removed without injury to the soil. The correctness of this finding upon the facts is challenged by plaintiff.

An examination of the record convinces us that the court properly so held and that the buildings erected upon the factory premises, together with the machinery therein, were of the nature of fixtures which did not during the period of the tenant's possession of the premises become parts of the freehold. Each piece was vacant at the time of the making of the respective leases. The buildings were placed thereon by the tenant, continuously assessed as personal property, and the taxes paid by the tenant, who also kept such buildings insured. The structures erected and the machinery contained in the several buildings on the factory premises were suitable for and devoted to a business purpose. The tenant therefore needed no express stipulation in the lease to give

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him the right to remove, at or before the lawful expiration of his term, all of said fixtures and the machinery therein contained. *State ex rel. Hansen S. Co. v. Bodden,* 166 Wis. 219, 164 N. W. 1009.

As to the dwelling house on the second strip of property, defendant by its notice of the proposed auction sale and by its pleadings expressly recites that such dwelling house was not to be removed from the premises. Such disclaimer of course is binding upon the defendant as much as though so declared by a judgment herein.

Whether defendant has anything of value to sell without the consent of the lessor under the second lease is not before us under the pleadings and the record. Its mere offer, therefore, to sell its leasehold interest in the forty-foot strip, the dwelling house to remain thereon, could give a purchaser no greater rights than those consistent with the terms of such second lease and can result, therefore, so far as the lessor is concerned, in no substantial injury to his rights. For want, therefore, of any threatened substantial invasion of his rights under the second lease, there is no sufficient warrant for any aid from a court of equity.

The plaintiff having failed to support the reasons alleged by him in his notice of May 8, 1920, upon which he claimed the right of re-entry upon the leased premises for breach of conditions, has no cause of action against the defendant and the court so properly held.

The defendant insists that it should be awarded full costs in this case instead of the limited amount as fixed by the trial court. We see, however, in this case no abuse of the discretion vested in the trial court in such an equitable action to award costs in whole or in part pursuant to sub. (7), sec. 2918, Stats., and the award of costs will not be disturbed. *Charles v. Godfrey,* 125 Wis. 594, 104 N. W. 814; *Boesen v. Preston,* 130 Wis. 418, 110 N. W. 208.

By the Court.—Judgment affirmed.

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WAGNER, Respondent, vs. LARSEN, Appellant.

March 9—April 5, 1921.

Automobiles: Collision with horse-drawn vehicle: Right of way at street intersections: Law of the road: Contributory negligence: Master and servant: Servant hired to another employer: Liability for negligence of servant.

1. In an action to recover for injuries sustained in a collision between plaintiff's automobile and a coal sleigh, where there was no evidence that plaintiff was driving at an excessive rate of speed, and there was evidence tending to show he was no evidence that plaintiff was driving at an excessive the question of contributory negligence is for the jury.
2. An automobile proceeding west on a city street had the right of way over a team going north on an intersecting street; and even if plaintiff, who was driving the automobile, had seen the team approaching, he was under no obligation to yield the right of way or assume that the driver of the team would not yield to him.
3. Although an employee, loaned with his own consent to a special employer, becomes the servant of such employer, if an owner hires his team and driver to another to do work to be designated and as directed by the hirer, but the hirer has no authority to discharge the driver and substitute another, the driver remains the servant of the owner in matters relating to the safety and management of the team, and the owner, and not the hirer, is liable to third persons for damages from his negligent management.
4. A finding based on ample evidence must be considered as a verity in the case.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This is an action to recover damages inflicted upon the person and automobile of plaintiff by reason of a collision with a coal sleigh in the city of Green Bay. The defendant, *Larsen,* is engaged in several industrial businesses in the city of Green Bay, in which, from April to November, he has use for a number of teams and drivers. During the winter months his regular work does not furnish employment for

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such teams and drivers and, in order to keep his organization intact, he hires his teams, drivers, and wagons to others.

The F. Hurlbut Company is a corporation engaged in the retail coal business in the city of Green Bay. A short time prior to the collision the defendant hired to the F. Hurlbut Company a team, sleigh, and driver named Lardinois, at a certain stipulated price per day, to be used by the Hurlbut Company in the delivery of coal. The Hurlbut Company had on previous occasions engaged similar help from defendant.

About 6:30 o'clock in the evening of January 4, 1917, Lardinois had completed the delivery of a load of coal pursuant to instructions from the Hurlbut Company and had started for defendant's barn with a sleigh and team. He was driving north on Madison street and plaintiff was going west on Crooks street. They collided at the intersection of Crooks and Madison streets. The evidence is not very clear as to how the collision occurred. The plaintiff, seemingly, had no idea as to how it occurred, and the testimony of Lardinois is exceedingly unsatisfactory. However, it appears from plaintiff's testimony that he was going west on Crooks street, which runs in an easterly and westerly direction, in a Buick roadster, inclosed with the ordinary isinglass curtains, driving at a moderate and lawful rate of speed on the right-hand side of the street within two or three feet of the curb. He testified that after he passed the intersection of Crooks and Madison streets, possibly a few feet, he does not know how far, it just appeared as though a house dropped on top of his car. He did not see anything in front of it, and, whatever it was, it took the wind-shield and top right off the car, broke the steering wheel and glass of the wind-shield, and rendered plaintiff unconscious for a few minutes.

Lardinois testified that he was driving north on Madison street, which runs in a northerly and southerly direction.

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He saw *Wagner's* car coming just before he hit the southeast line of the intersection of Madison and Crooks streets, about at the crossing, he would judge. *Mr. Wagner* was then not more than forty feet from him. He switched his horses east on Crooks street to avoid being hit. When he was hit his team was facing to the east on Crooks street at the intersection of Madison and Crooks streets, but he could not say whether he was over the center of the intersection or not. His sleigh tongue was struck by *Mr. Wagner's* car and one horse was knocked down. He did not look to see what became of the automobile, but trotted his team up Madison street, and the next day he denied that he was in an accident when asked by the Hurlbut Company concerning the same. He paid for the broken sleigh tongue upon the demand of *Larsen,* owner of the sleigh.

By special verdict the jury found that Lardinois was guilty of negligence, that the plaintiff was free from negligence, and that the former was not a servant or employee of the Hurlbut Company in the driving or the handling of the team and sleigh. Judgment was rendered in favor of the plaintiff, and the defendant brings this appeal.

For the appellant there was a brief by *Silverwood, Fontaine & McCreery* of Green Bay, and oral argument by *A. B. Fontaine* and *T. P. Silverwood.*

For the respondent there was a brief signed by *Victor I. Minahan* of Green Bay, and oral argument by *Mr. Minahan.*

OWEN, J. It is strenuously argued on the part of the appellant that the plaintiff was guilty of contributory negligence. Diagrams are presented and distances are delineated thereon to indicate that the plaintiff could have seen defendant approaching when he was upwards of 200 feet east of Madison street, the conclusion being that had he exercised care he would have seen the approaching team and avoided the accident. There is no evidence that the plaintiff was driving at an excessive rate of speed. There is evidence

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from which the jury might have found that he was traveling where he had a right to travel, namely, on the right side of the street in close proximity to the curb. He had the right of way over the team going north on Madison street. Even though he had seen a team approaching, as he had the right of way he had no reason to assume that Lardinois would drive the team into his automobile. The answer to defendant's argument in this respect is, even though plaintiff had seen the team approaching he was under no obligation to yield the right of way nor to assume that Lardinois would not stop and yield the right of way to him.

Upon the meager facts concerning the cause of this collision it was plainly a jury question. The evidence was abundant to show negligence on the part of Lardinois, and the jury was plainly justified in exonerating the plaintiff of any negligent conduct. Not only the testimony of Lardinois but his subsequent actions are strongly indicative of guilt. He did not pause to see what had become of the automobile. He made no effort to find out who the owner was. He did not even notice that the automobile had collided with a tree. He proceeded at a smart pace on his way. He paid for the broken sleigh tongue upon demand without protest. He denied having been in a collision when questioned by the Hurlbut Company. It is plain that the verdict of the jury in this respect cannot be disturbed.

The important question in the case is whether the defendant is liable for Lardinois' negligence, and this depends upon whether, in the performance of the negligent act resulting in the collision, Lardinois was the servant of *Larsen*. It is contended by appellant that he was the servant of Hurlbut and not of *Larsen* and that the doctrine of *respondeat superior* is applicable to the Hurlbut Company and not to *Larsen*. "It is well settled at common law that where an employee with his own consent was loaned to a special employer he became the servant of such employer." *Cayll v. Waukesha G. & E. Co.* 172 Wis. 554, 179 N. W. 771; *Standard*

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Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252. To this rule, however, an exception has been firmly established by a well nigh unbroken line of decisions, which exception may be stated as follows: Where an owner hires his team and driver, or his automobile and chauffeur, or his machine and operator to another to do work to be designated and as directed by the hirer, the hirer having no authority by the terms of the contract of hire to discharge the driver, chauffeur, or operator and substitute another, the driver, chauffeur, or operator remains the servant of the owner in matters relating to the safety and management of the team, automobile, or machine, and the owner is liable to third persons for damages resulting from the negligent management or operation of the team, automobile, or machine by such servant. *Quarman v. Burnett,* 6 M. & W. 499; *Driscoll v. Towle,* 181 Mass. 416, 63 N. E. 922; *Shepard v. Jacobs,* 204 Mass. 110, 90 N. E. 392; *Morris v. Trudo,* 83 Vt. 44, 74 Atl. 387, 25 L. R. A. N. S. 33; *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516, 15 N. W. 887; *Freeker v. Nicholson,* 41 Colo. 12, 92 Pac. 224, 13 L. R. A. N. S. 1122; *Wilbur v. Forgione & Romano Co.* 109 Me. 521, 85 Atl. 48; *Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 Sup. Ct. 252; *Gerretson v. Rambler G. Co.* 149 Wis. 528, 136 N. W. 186; *Ouellette v. Superior M. & M. Works,* 157 Wis. 531, 147 N. W. 1014. See, also, notes in 37 L. R. A. 33; 13 L. R. A. N. S. 1122; 25 L. R. A. N. S. 33; 38 L. R. A. N. S. 973; L. R. A. 1918E, 121.

The reason is that the hiring is not of the team distinct from the driver or of the driver distinct from the team, but is the hiring of the entity composed of the two. While the hirer acquires dominion or authority over the entity to designate the work that shall be done and direct the manner of doing it, he acquires no authority to direct how the team shall be driven, managed, or cared for, nor can he divide the entity by separating the driver from the team. He may

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dispense with the services of the entity—the driver and the team—but he cannot discharge the driver and substitute another. The safety and well-being of the team is a matter of concern to the owner. It may be greatly damaged from the standpoint of health and soundness, as well as disposition and habits, by unskilful management and inconsiderate and cruel treatment. Hence the owner says, in effect: "I will not hire my team to be driven by a stranger, but I will hire my team with a driver of my own choosing, one in whom I repose trust and confidence. You shall not discharge him and substitute another. That is a right I reserve." It is entirely possible and consistent, as pointed out in *Driscoll v. Towle,* 181 Mass. 416, 63 N. E. 922, for the driver to be the servant of the hirer in the general performance of the work and remain the servant of the owner in the details of driving, caring for, and managing of the team.

The last load of coal delivered by Lardinois on the day in question contained three tons for three different customers. The coal company could direct the route he should take, the customer he should first serve, to sprinkle the coal, and to collect before delivery, etc. In all such respects he was acting as the servant of the coal company, and if he had driven the heavily loaded wagon over an adjacent lawn in approaching a customer's dwelling the coal company would no doubt have been liable for the damage. But this collision resulted from his negligence in the immediate handling of the team. In this respect he was not the servant of the coal company. He was the servant of *Larsen,* and for his negligence *Larsen* and not the coal company is liable.

In this case the jury found that Lardinois, at the time of the collision, was not the servant or employee of the F. Hurlbut Company in the driving or handling of the team and sleigh. Under the instructions given by the court in submitting this question to the jury, its answer to the question was tantamount to a finding that the coal company

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acquired no authority by virtue of the contract of hiring to discharge Lardinois as the driver of the team. As the finding is based upon ample evidence it must be considered as a verity in the case, and the respective liability of the parties is governed by the principle embodied in the exception above stated.

Attorneys for appellant have dwelt upon the proposition that *Larsen* is not the principal contractor, hence not liable. We agree that *Larsen* was not a principal contractor, but we have demonstrated, we trust, that his liability is not dependent upon that fact. By the application of well-settled principles of law to the facts as found by the jury the liability of the defendant is plain. The judgment must stand.

By the Court.—Judgment affirmed.

GALLAGHER, Respondent, vs. GALLAGHER, Appellant.

March 10—April 5, 1921.

Divorce: Custody of child of parties: Division of estate: Reduction on appeal: Judgment of divorce not appealed from conclusive.

1. Where the court granted a divorce to the wife, and the evidence was conflicting on the subject of the fitness of the respective parents to rear their four-year-old son, but there was no claim that the mother was not a suitable and proper person, a judgment awarding custody of the son to the mother until he became old enough to live with the father will not be disturbed on appeal, though the record indicates that the child's home environment while in his mother's custody would not be as perfect as might be desired.
2. Where it appeared that plaintiff was a widow with two children when she married defendant and that during their married life defendant had turned over his wages, except a small part, to his wife to be applied for family use, and that his property, valued at about $7,000, was practically all accumulated without plaintiff's assistance, an award to plaintiff of $2,601, with monthly payments for the support of the child, is excessive and will be reduced to the sum of $1,500.

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3. On defendant's appeal from the award of the custody of the child to his wife and from the order dividing the property, but not from the judgment granting her a divorce, the judgment of divorce must stand, though it is evident from the record that plaintiff stood in no better light before the court than defendant.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed in part; reversed in part.*

The appeal is from those portions of a divorce judgment which give to the respondent the custody of the minor child of the parties for a limited time and which finally divide and distribute the property of the defendant.

The plaintiff sued for and defendant counterclaimed for divorce, each charging cruel and inhuman treatment. The plaintiff was granted judgment for absolute divorce from the defendant. The court's findings on the issue of cruel and inhuman treatment and the judgment as to the divorce are not questioned on this appeal. The appeal is taken from those portions of the judgment which find (1) that while both parties are fit and proper persons to have the custody of the child, it is to the best interests of the child to remain with its mother until it is old enough to live with its father; (2) that the defendant is worth $7,000 besides the household furniture of the parties, which is worth $800; (3) that the defendant pay to the plaintiff the sum of $20 per month during the time that plaintiff resides in Brown county and keeps the child in Brown county, but not later than the sixteenth birthday of the child.

For the appellant there was a brief signed by *Victor I. Minahan* of Green Bay, and oral argument by *Mr. Minahan.*

For the respondent there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *Joseph F. Martin.*

SIEBECKER, C. J. The court awarded custody of the four-year-old son of the parties to the plaintiff "until said

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child is old enough to live with its father, when, upon proper showing, the custody of said child will be changed." Defendant is given the right to visit and have the child with him at reasonable times within the limits of Brown county. The judgment also provides that defendant pay plaintiff $20 per month for the care and maintenance of the boy while the child resides with plaintiff in Brown county. It is urged that this determination of the court is not just and proper in view of the uncontroverted facts of the case. It is claimed by defendant that plaintiff is not a suitable and proper person to have the care and custody of the infant son. The record shows a state of facts which indicate that the child's home environment, while in plaintiff's custody, may not be as perfect as might be desired, yet we cannot say that the trial court clearly erred in awarding the custody of the boy to the plaintiff during his very tender years. There is conflict in the evidence on the subject of his parents' fitness to rear this child. The trial judge undoubtedly knows the conditions of these parties better than this court can know them, and so we feel that we cannot disturb his conclusion on this question in the case.

It is urged that the final division and distribution the court decreed of defendant's estate is an unjust and inequitable one. The court finds that defendant had an estate of the value of $7,000 over and above his liabilities at the time of the trial. The plaintiff is awarded out of this the household furniture valued at $800; the equity in the homestead, valued at $1,599, and the merchandise she purchased the day before she started action, amounting to $242.65, making a total of $2,601.65, leaving for defendant property of the value of $4,398.35. This division is not an equitable and just one in the light of the facts of the case. At the time of their marriage the plaintiff was a widow, had two children, and was about twenty-four years of age. The defendant was unmarried, without family, and forty-nine years of age. The defendant during their married

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life was industrious and earned good wages, which, excepting a small part, he turned over to his wife to be applied for family use. The property now owned by defendant was practically all accumulated without plaintiff's assistance. The treatment the parties mutually accorded each other is properly characterized by the trial court as follows: "Both parties are at fault for their troubles and the court has considered dismissing both complaint and counterclaim." But the court was of opinion that sufficient cause for a divorce existed, and declared: "Because of being the mother of the son, the divorce will be granted plaintiff." It is evident from the record that the plaintiff stands in no better light before the court than the defendant. There is, however, no appeal from the judgment of divorce and it must stand. An attentive study of the case has persuaded us that the trial court has awarded plaintiff an excessive amount of defendant's estate and that the award must be reduced. Upon the basis of valuation of defendant's property found by the court, namely, $7,000, we think the amount of $2,601.65 awarded plaintiff, made up of the items above indicated, should be reduced by deducting therefrom the sum of $1,101.65, thus awarding to plaintiff out of defendant's estate the sum of $1,500. The judgment is therefore to be modified accordingly in making a final division and distribution of defendant's estate, and is to stand in all other respects except that plaintiff shall have the right to elect whether or not she will take the homestead upon the conditions imposed by the circuit court.

By the Court.—The part of the judgment appealed from respecting the division and distribution of defendant's estate is reversed; the judgment in all other respects is affirmed, and the cause remanded to the circuit court to award judgment in accordance with this opinion.

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SLOAN, Respondent, vs. BROWN COUNTY STATE BANK, Appellant.

March 10—April 5, 1921.

Conversion: Measure of damages: Trial: Burden of proof: Prejudicial error.

1. When defensive matter only is pleaded by a defendant, the trial court should so frame the special verdict that the burden of proof rests on the plaintiff to establish his claims.
2. In an action against a bank for the conversion of corporate stock pledged as collateral to a loan to a third person, where plaintiff alleged in his complaint that he pledged the stock, the fact that the bank in its answer averred that the stock was pledged by the borrower did not change the burden of proof, and the court erred in his charge in practically informing the jury that plaintiff could recover unless the bank could disprove his claim that he pledged the stock.
3. The placing of the burden of proof on the wrong party, where the jury finds against him, is prejudicial error.
4. The market value of the shares of stock at the time of the conversion is the measure of plaintiff's damages.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

Action for the conversion of certain shares of stock pledged as collateral security with the defendant for a loan to one Hooker. When Hooker repaid the loan the bank delivered the shares of stock to him and he repledged them at another bank for a larger loan and plaintiff lost them because Hooker did not repay the loan. Plaintiff alleged in his complaint that he was the owner of the shares of stock and that he pledged them as security for Hooker's loan. The bank alleged in its answer that the shares of stock were pledged by Hooker and not by the plaintiff, though it knew he was the owner of the stock, and it is conceded he came into the bank and indorsed the shares of stock in pencil for the purpose of their being pledged.

Upon the disputed issues the court submitted to the jury the questions: (1) Did the plaintiff, *Sloan,* loan and deliver

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such ten shares of stock to R. L. Hooker for the purpose of Hooker's pledging it and obtaining a loan on such stock? and (2) If you answer question 1 No, then did the plaintiff, *Sloan,* allow Hooker to so use such stock that when the debt was paid the defendant bank had a right to rely on such use and deliver such stock to Hooker as the agent of the plaintiff? The jury answered both questions No, and found the market value of the stock to be $825 when delivered to Hooker June 21, 1919.

Upon the first question the court instructed the jury:

"The parties have taken issue as to when delivery of this stock was made. There is a dispute on whether *Sloan,* the plaintiff, delivered the stock to R. L. Hooker for him to make a loan on it and pledge it, or whether *Sloan,* the plaintiff, made the delivery of the stock to the bank for Hooker's loan. . . . Now the burden of proof is on the defendant bank to satisfy you to a reasonable certainty by a preponderance of the evidence that the plaintiff, *Sloan,* delivered the stock to Hooker for the purpose of his pledging the same for a loan. If you are so satisfied, then you must answer this question Yes. If you are not so satisfied, then you must answer it No."

Judgment for plaintiff was entered upon the special verdict, and the defendant appealed.

For the appellant there was a brief by *Kittell, Jaseph & Young* of Green Bay, and oral argument by *Lynn D. Jaseph.*

For the respondent there was a brief by *Kaftan & Reynolds* of Green Bay, and oral argument by *Robert A. Kaftan.*

VINJE, J. When defensive matter only is pleaded by a defendant the trial court should so frame the special verdict that the burden of proof rests upon the plaintiff to establish his claims. *Kausch v. Chicago & M. E. R. Co.* 173 Wis. 220, 180 N. W. 808. Here plaintiff's claim as made both by the complaint and evidence was that he pledged the stock. The defendant denied this. The fact that in its answer it

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alleged that Hooker pledged it and not plaintiff did not affect the issues in the case nor change the burden of proof. Under a general denial defendant could have shown that Hooker and not plaintiff pledged the stock. The burden of proof was upon plaintiff to establish his case, not, as the court charged, upon the defendant to disprove it. As the case went to the jury the trial court practically said plaintiff can recover in this case unless defendant can disprove his claims and the burden of proof is upon it to disprove them. This was the main issue in the case and the evidence was sharply in conflict upon it. Under such circumstances the placing of the burden of proof upon the wrong party where the jury finds against it constitutes prejudicial error. *Kausch v. Chicago & M. E. R. Co., supra,* and cases cited.

The plaintiff's measure of damage was correctly stated by the trial court as the market value of the shares of stock at the time of conversion.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

SRNKA, by guardian *ad litem,* Appellant, vs. JOINT DISTRICT No. 3 and another, Respondents.

March 10—April 5, 1921.

Schools and school districts: Schools as public buildings: Liability of district for unsafe building.

Sec. 2394—48, Stats., requiring every owner of a public building to so construct it as to render it safe, and sec. 2394—49, providing that no owner or other person shall construct or maintain any public building that is not safe, do not apply to school districts or school buildings or render a school district liable to a pupil for injuries from a defect in the building, in view of sub. (13), sec. 2394—41, defining the term "owner" and not mentioning school districts, sec. 2394—4, expressly including school districts in those required to make compensation for injuries to employees, sec. 2394—51,

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giving the industrial commission supervision of the public buildings referred to, and ch. 30, Laws 1913 (now sec. 39.02, Stats.), making a different provision for the inspection of school buildings.

APPEAL from an order of the circuit court for Kewaunee county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The trial court sustained a demurrer to the complaint. The complaint alleged, in substance, that the defendants, municipal corporations, owned and maintained a public-school building for public-school purposes in which the minor plaintiff was a pupil.

"That it was the legal duty of the defendants to keep and maintain said school building so as to render the same safe and free from danger to the life, health, and safety and welfare of employees and frequenters and the public, and to maintain said building so as to be free from danger to the life, health, safety, and welfare of the persons lawfully attending said school building as pupils."

That in violation of their duty to the plaintiff they failed to keep and maintain the school building in a safe condition, in that some time prior to the happening of the injury to plaintiff they erected a wooden partition in certain portions of the building with a doorway therein, and permitted to remain in said doorway, at a height of between four and five feet from the floor, a knot-hole of one and a half or two inches in diameter. That said condition was allowed to remain for a considerable period of time, the defendants well knowing that the pupils attending such school were disposed to and would constantly use said knot-hole for the purposes of play and amusement and that such had been so used for ten or eleven weeks prior to the injury. That on or about November 25, 1919, at the noon hour, the plaintiff on returning to the school found the said door barred or locked; that then using the knot-hole to look through into the other room to ascertain the reason therefor, another pupil, who was participating in the frolic of barring said door to the

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plaintiff, poked a steel file through the knot-hole into the eye of the plaintiff, seriously injuring the same and necessitating its removal.

From an order sustaining defendants' demurer plaintiff appealed.

For the appellant there were briefs by *Minahan, Minahan, Minahan & Duquaine* of Green Bay, and oral argument by *E. M. Duquaine.*

For the respondents there was a brief by *Bruemmer & Bruemmer* of Kewaunee, and oral argument by *L. W. Bruemmer.*

ESCHWEILER, J. It is frankly conceded by plaintiff that there is no common-law liability here, the defendants being engaged in what has been repeatedly recognized as a governmental function, and for their negligence or that of their servants in the performance of such function or duty there arises no liability therefor on the part of such municipal corporations to any person thereby injured. *Juul v. School Dist.* 168 Wis. 111, 113, 169 N. W. 309.

It is contended, however, that liability is here sustained by reason of the provisions of secs. 2394—48 and 2394—49, Stats., the material parts whereof read as follows:

"Section 2394—48. Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof. . . . Every employer and *every owner* of a place of employment *or a public building* now or hereafter constructed shall so construct, repair or maintain such place of employment or public building, . . . *as to render the same safe.*

"Section 2394—49—1. No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, . . . and no employer *or owner, or other person* shall hereafter construct or occupy or maintain any place of employment, *or public building,* that is not safe. . . ."

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The appellant asserts that the school house in question is a public building and the defendants the owners thereof within the meaning of such statutes, and that defendants have breached the duties so imposed upon them, and from such breach there arises the consequent liability as claimed in the complaint.

We have arrived at the conclusion that a school building is not one of the public buildings nor is a school district such an owner as come under the provisions of the said sections.

Prior to 1913 the sections above quoted were limited in their effect to the employers of labor. By ch. 588 of the laws of that year the then existing sections were made to cover public buildings as well as places of employment and broadened out so as to read as they now stand and as quoted above. By the same chapter there was added to sec. 2394—41, Stats., a new subdivision, sub. (13), which reads, so far as material here, as follows:

"(13) The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village manager, representative, officer, or *other person* having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance, of any place of employment or public building. . . ."

In this statutory designation of owners school districts are not mentioned. It is contended, however, that school districts being municipal corporations as much so as the counties, towns, cities, and villages therein expressly mentioned, school districts were intended to be also included under the general term "other person" as therein found.

The law in question is a part of the workmen's compensation and industrial commission act, ch. 110*a*, Stats. This chapter, in establishing the conditions as to liability between employer and employee, included in the definition of employers to be held liable for compensation for injuries

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sustained to their employees in the line of their duty as follows:

"Section 2394—4. (1) The state and each county, city, town, village and *school district* therein."

Such provision has remained unchanged since the original enactment on the subject by ch. 50, Laws 1911. It is apparent, therefore, that on the face of the statutes there is seen an express intention to include a school district as being subject to the law providing for compensation to injured employees and the exclusion thereof in the "safe place" statutes relied upon by plaintiff to support his cause of action.

At the same session of the legislature in 1913 which broadened secs. 2394—48 and 2394—49 as aforesaid, another enactment was made by ch. 30, Laws 1913, creating what was then designated as sec. 517 and what now appears as sec. 39.02, providing for the inspection of school buildings. This placed in the state superintendent of schools the supervision and direction of the inspectors of rural schools, of state graded schools, and of high schools, who were thereby made inspectors of public school buildings. It also provided that upon complaint to the state superintendent that any school building is in an unsanitary condition or such as to endanger the life and health of the children attending school, or is unfit for school purposes, such building is then subject to such inspection, and, if conditions warrant, orders may be issued for the necessary repairing, improving, or remodeling of such school buildings. These provisions are set out at length and discussed in *State ex rel. School Dist. v. Cary,* 166 Wis. 103, 163 N. W. 645.

Such law also expressly provided that it should not be deemed to interfere with the operation of the law relating to the duties of county superintendents or that of the inspection and regulation of the sanitary conditions of school houses by boards of health. It did not, however, make any such exception to any recognized powers or duties over such school buildings by the industrial commission.

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By sec. 2394—51, Stats., the industrial commission is vested with power and jurisdiction to supervise every place of employment and public building in this state which is included within the provisions of ch. 110*a*, including said secs. 2394—48 and 2394—49, *supra*.

The legislature therefore having made such a special and express provision for school buildings by ch. 30, Laws 1913, we have no right to hold that they are also included in the general language found in sub. (13), sec. 2394—41, *supra*, by ch. 588 of the same year.

Manifest reasons can be seen for including school districts when considered as employers of labor for compensation to the injured employee and excluding them when it comes to the far broader field of creating a liability not heretofore existing to the frequenters of school buildings in which is carried on the duty imposed upon such school districts by sec. 3, art. X, of the constitution.

Having reached the conclusion that there can be no liability herein predicated upon the sections of the statute relied upon by plaintiff, it is unnecessary to consider any other questions discussed in the briefs, and it follows that the demurrer to the complaint was properly sustained.

By the Court.—Order affirmed.

GRIMM, Trustee, Appellant, vs. BAYFIELD COUNTY and another, Respondents.

March 10—April 5, 1921.

Taxation: Action to cancel tax certificates: Irregularities in assessment and levy: Mistake of town clerk in warrant: Directing payment of excessive amounts to county: Evidence: Record of town meeting: Parol evidence to show motion carried: To show date of meeting: Proof of population of town.

1. Where the records of a town meeting, kept by the town clerk under sec. 60.16, Stats., showed that a motion was made and seconded, without showing what became of the motion, parol evidence was admissible to show that the motion was carried.

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2. Where such records stated that the annual meeting was held April 5th, though the meeting was required by law to have been held on April 3d, parol evidence was admissible to show that no town containing less than 500 inhabitants shall collect notation in the record that the "annual meeting" was held April 5th contained inconsistent statements, making the record on its face worthless as evidence.
3. While the court may take judicial notice of the federal census, the population of a town, under sec. 1240, Stats., providing that no town containing less than 500 inhabitants shall collect a highway tax of more than $2,000, is not determined by the preceding federal census, but by the number of inhabitants when the tax is sought to be levied, and is a fact to be proved in the same manner as any other fact; and a taxpayer who claimed that the highway tax of a town was invalid because the population of the town was less than 500 had the burden of proving that fact.
4. The fact that the town clerk inserted erroneous amounts which were to be paid to the county treasurer in the blank spaces in the warrant attached to the tax roll when delivered to the town treasurer, under sec. 1081, Stats., did not affect the validity of the tax, such error relating only to the distribution of the money after collection of the tax.
5. The amount to be paid to the county treasurer for state and county taxes is legally determined, and a mistake made by the town clerk or town treasurer, or any other official, in that respect would not be binding on the town and is of no consequence to the taxpayer, since it will not be presumed that the county treasurer would receive from the town treasurer more than the amount levied against the town, and, if he did so, the county would acquire no title to the funds and they could be recovered by the town.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Plaintiff is the owner of 26.59 per cent. of the real estate in the town of Bell, *Bayfield County.* He failed to pay his taxes on said real estate for the year 1917. The lands were returned as delinquent, sold at tax sale, and tax certificates issued thereon. This action was brought to cancel said tax certificates on the grounds of fundamental irregularities in the assessment and levying of the tax. Subsequent to the commencement of the action he paid to the county treasurer

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of *Bayfield County* the total amount of the taxes so levied, as required by the provisions of sec. 1210*h*—1, Stats. The circuit court held that the sum of $92.31 was unlawfully assessed against said lands and rendered judgment in plaintiff's favor for that amount. From the judgment so entered plaintiff appealed.

For the appellant the cause was submitted on the brief of *John J. Fisher* of Bayfield.

For the respondents there was a brief by *Walsh & Morris* of Washburn, and oral argument by *Charles F. Morris.*

OWEN, J. Sec. 60.16, Stats., provides that the town clerk shall be the clerk of the town meeting and keep faithful minutes of the proceedings thereof. The minutes kept by the town clerk of the annual town meeting held in the town of Bell for the year 1917 are headed as follows:

"Annual meeting, Cornucopia, Wisconsin, held at school house, April 5, 1917."

The minutes also contained the following:

"It was moved and seconded that the appropriation on highway be $2,500, general $1,000."

The annual town meeting for the year 1917 was required by law to be held on April 3d. Plaintiff contends that the minutes of the town clerk conclusively show that it was held on April 5th and was therefore unlawful. He further contends that the motion above stated is not shown to have been put or carried, consequently furnished no basis for the levying of a highway tax to the amount of $2,500 or a general tax to the amount of $1,000. Parol evidence was received to the effect that the annual town meeting was in fact held on April 3d and that the motion above stated was put and carried, and the court so held. The reception of such evidence is assigned as error.

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"The authorities are not in harmony as regards whether evidence *aliunde* the official record is permissible to show proceedings of a public governing body, where the law requires such a record to be kept. The rule here is that such evidence is not admissible where the effect thereof will be to vary or contradict the record, but may otherwise be received for the purpose of showing occurrences which, through oversight or some other cause, were not recorded." *Chippewa B. Co. v. Durand,* 122 Wis. 85 (99 N. W. 603) at p. 103.

In the instant case the record failed to show what became of the motion which was duly seconded. The parol evidence simply showed that it was carried. This was an occurrence which through oversight or some other cause was not recorded, and, clearly, the evidence was admissible under the rule above stated.

The law required the annual town meeting for the year 1917 to be held on the 3d day of April. The minutes of the town clerk indicated that it was held on April 5th. The notation, "Annual meeting, Cornucopia, Wisconsin, held at school house, April 5, 1917," at the head of the minutes, contained inconsistent statements. If it were the annual town meeting it could not have been held on April 5th; and if held on April 5th it could not have been the annual town meeting. It is apparent, therefore, that the clerk erred in one or the other respect. The record demonstrates upon its face its worthlessness as evidence. To deny the admission of parol evidence is to halt the inquiry and to confess the impotency of courts to ascertain the truth. We hold that parol evidence was admissible to show on what date the annual town meeting was in fact held. There was no error in receiving the parol evidence to show the actual date of the annual town meeting, or that the motion providing for the levying of the tax was in fact put and carried.

Sec. 1240, Stats., provides "that no town containing less than five hundred inhabitants shall levy or collect in any year a highway tax of more than $2,000." Appellant contends that the town of Bell contained less than 500 in-

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habitants. The record is barren of any evidence showing or tending to show the population of the town of Bell during the year 1917. The federal census for the year 1910 showed that the population of the town at that time was 263. While the court may take judicial notice of the federal census (*State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 510, 51 N. W. 724), the census taken in 1910 throws no light on the population of the town in 1917. The statute does not provide the manner in which the population of the town shall be determined, and it was pointed out in *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 150 N. W. 526, that it is a fact to be proved as any other fact. In this case the plaintiff challenges the right of the town to appropriate more than $2,000 for highway purposes. The burden, therefore, was upon him to show that the town contained less than 500 inhabitants. There being a failure of proof in this respect, there is nothing in the record, nor is there anything of which the court may take judicial notice, which would justify an affirmative finding in this respect. It follows that the illegality of the highway taxes has not been established.

Sec. 1081, Stats., prescribes the form of warrant which the clerk is required to attach to the tax roll when delivered to the town treasurer. As to the distribution of moneys, it directs the town treasurer as follows:

"After deducting your fees, you are first to pay to the treasurer of said county, on or before the first Monday in March next, the sum of —— for state taxes; you are to retain and pay out as town treasurer, according to law, the sum of ——, and the balance of said moneys you are required to pay to said treasurer for county purposes, on or before the twenty-second day of March, by which day you are further required to make return to said treasurer of this warrant, with said roll annexed."

The town clerk committed manifest errors in inserting in the blank spaces the amounts which were to be paid to the county treasurer. It is claimed by appellant that this error on the part of the town clerk invalidates the tax. Clearly it

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has nothing to do with the validity of the tax, but relates only to the distribution of the money after the tax is collected. The direction of the town clerk to the town treasurer to pay an excessive amount to the county treasurer for state and county taxes does not amount to an unalterable disposition of the moneys. The amount to be paid to the county treasurer for state and county taxes is legally determined, and a mistake made by the town clerk, or town treasurer, or any other official in that respect would not be binding on the town, and is of no consequence to the taxpayer. In the first place it is not to be presumed that the county treasurer would receive from the town treasurer more than the amount levied against the town. In the second place, if he did do so, the county would acquire no title to the funds and they could be recovered by the town. This contention on the part of appellant is entirely unavailing.

We have deemed it unnecessary to advert to the irregularities which prompted the trial court to render judgment in favor of the plaintiff for a return of $92.31, as the correctness of that feature of the judgment is not questioned.

The foregoing disposes of the contentions made by appellant to establish his right to a cancellation of the tax certificate or to judgment for a further rebate. We find no error in the disposition which the trial court made of the case, and the judgment should be affirmed.

By the Court.—Judgment affirmed.

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STATE EX REL. CITY OF ASHLAND, Respondent, vs. ASHLAND COUNTY, Appellant.

March 10—April 5, 1921.

Taxation: Terminal properties of public utilities: Assessment: Valuations not usable in county equalization.

1. Under sub. (4), sec. 1211—8, Stats., requiring the state tax commission to make a separate valuation of docks, piers, wharves, and grain elevators of public utilities, and sec. 1211—29, providing that taxes based on such separate valuation shall be distributed to the towns and cities in which such docks, etc., are located, the city in which such properties are located is entitled to the full benefit of the taxes derived therefrom without any direct or indirect impairment, and the valuation thereof should not be included in the county board's equalization.
2. Under sec. 1211—6, Stats., declaring terminal properties of public utilities personal property to be assessed at the capital of the state, the local assessor has no duty to perform as to the assessment of such terminals.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Certiorari to the county clerk of *Ashland County* to review the determination and assessment of the relative value of all taxable property in each town, city, and village in the county made by the county board of equalization pursuant to sec. 1073, Stats. 1919. On defendant's motion to quash the writ for the reason that the petition on its face shows that petitioner is not entitled to the relief asked, petitioner had judgment, and an adjustment of the resulting excess of taxes levied on the city was ordered. The county appeals.

The petition in substance alleges: That the petitioner, city of *Ashland,* is a municipal corporation of the state and an independent taxing district of *Ashland County;* that the county board of *Ashland County* met in 1919 pursuant to sec. 1073 of the Statutes and determined and assessed the relative value of all the taxable property in each town, city, and village which collects taxes independently in said county,

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including the petitioning city, in the amounts and proportions as set forth in a table; that the amounts so set forth are those recommended by the assessor of incomes for *Ashland County* for the year 1919; that the assessment of property in the city of *Ashland* as set forth in said table contained, and was increased by, an amount of $1,646,000 which petitioner alleges was unlawful; that said amount of increase was included by the said assessor of incomes for the following reasons stated by him: that he was directed by the Wisconsin tax commission to add the valuation of terminal properties in the city of *Ashland* to the aggregate true value of other property—otherwise such properties would escape entirely their share of state and county taxes; that the commission in making the state assessment does not include these properties and all the tax collected goes to the city of *Ashland;* that the city of *Ashland* thereby received $49,379.34, which amount, capitalized at the local tax rate of three per cent., gives a valuation of $1,646,000, which was added to the aggregate true value of the city, $8,887,248, making a total of $10,533,248.

The petition, continuing, alleged that the inclusion of any of this sum of $1,646,000 was illegal, was adopted by the county board over the protest of certain members, and would not have been included except through the advice of the tax commission; that the city of *Ashland* appealed to the tax commission from the aforesaid determination, but that the appeal was dismissed and the equalization of the county board approved and confirmed; that by reason of such illegal valuation the city of *Ashland* has been compelled to pay an unjustly large portion of state and county taxes for the year 1919, to its injury; and that the so-called "terminal property," being the property on which the tax commission makes a separate valuation of docks, elevators, and the like under sub. (4), sec. 1211—8, Stats. 1919, and on which the tax is returned to the municipality where such property

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is situated under sec. 1211—29, Stats. 1919, is not property subject to local assessment and taxation.

Petitioner prayed for the writ in order that the action of the county board might be reversed and set aside or corrected by deducting said $1,646,000 from the aggregate assessment of the city of *Ashland,* and for such other and further relief as may be just and proper.

For the appellant the cause was submitted on the brief of *G. F. Merrill* of Ashland.

For the respondent there was a brief by *W. Stanley Smith,* and oral argument by *M. E. Dillon,* both of Ashland.

JONES, J. The following is one of the sections of the statute relating to the taxation of public utilities:

"(4) After the property of a company shall first have been valued as a whole, if any docks, piers, wharves or grain elevators used in transferring freight or passengers between cars and vessels, shall have been included in such valuation, then for the purpose of accounting to the proper assessment districts, the commission shall make a separate valuation of each such dock, pier, wharf and grain elevator, including the approaches and appurtenances thereto." Sec. 1211—8, Stats. 1919.

Sec. 1211—29 provides that all taxes paid by such companies

"derived from or apportionable to docks, piers, wharves or grain elevators and their approaches and appurtenances, on the basis of the separate valuation provided for in section 1211—8 shall be distributed to the towns, cities and villages in which they are located."

In *State ex rel. Superior v. Donald,* 163 Wis. 626, 158 N. W. 317, it was claimed that the provision in the statute for the distribution of taxes derived from terminal property to the municipality was unconstitutional. The most serious objection urged was that the provision created an arbitrary discrimination and an improper classification, and resulted

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in an inequality of burden between the municipalities of the state. In the decision Mr. Chief Justice WINSLOW followed the rule laid down in the case which sustained the validity of the law applying the system of *ad valorem* taxation to railway property and which placed the entire proceeds in the state treasury for state purposes. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557. In the decision in this case Mr. Justice MARSHALL said (at p. 675):

"The idea indicated in the new order of laws is to value each railway property as one thing and on the same basis as other taxable property is valued, and to tax it on the same basis as such other property is taxed, throughout the state and as to each taxing district through which the road runs, as near as the same can be reasonably ascertained, keeping the results in the state treasury, upon the theory of a constructive accounting between the state and every taxing district which, in any reasonable view, would be entitled to any part thereof under the constitutional rule of uniformity."

In the *City of Superior Case, supra,* Mr. Chief Justice WINSLOW said (at p. 630):

"Time has demonstrated, however, that this constructive accounting does not accurately work out the result intended at terminal cities such as Superior, where there must be a vastly expensive and entirely different class of terminal from the ordinary land terminal of a railway company. The most striking illustration of this fact is furnished by the situation at the city of Superior itself, where it appears that the total assessed valuation in 1915 was $34,258,688, of which $7,717,604, or twenty-two and one-half per cent., was railroad wharfage property of this class.

"That the possession and maintenance of such property imposes upon the municipality in which it is located an enormous and peculiar burden, financially greater and essentially different in some of its characteristics from the municipal burdens borne by inland municipalities, seems very clear. The annual requirements for dredging, policing, and otherwise maintaining a great harbor so that the change from land to marine carriage can successfully go on, is an onerous burden, and it may, we think, be properly considered as so peculiar in its nature as to rightly suggest that the proceeds of taxation derived from these expensive joint agencies of

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land and water commerce should be returned to the municipality which is under this peculiar burden while reaping little of benefit from its possession of them unless it be accomplished in this way. The legislature evidently concluded that the constructive accounting supposed to have been reached by the *ad valorem* law failed at this point, and passed the present law for the purpose of more perfectly fitting the fact to the theory and working out the constructive accounting principle with greater accuracy."

It was further held that there was legal ground for classification and that the statute caused no actual discrimination between the taxing units of the state.

The rule adopted in this decision applies with equal force to the city of *Ashland*. As we construe the statutes and the former decisions of this court, it was the legislative intent that cities of this character, by the system of accounting adopted between them and the state, should have the full benefit of the taxes derived from this class of terminal property on account of the peculiar and onerous burdens it imposes.

The tax rate in terminal cities may be considerably higher than the average tax rate throughout the state as determined by the tax commission, so that to add the true value of these terminals to the assessed value of the cities in which they are located may partly defeat even the purpose of the statute as it is interpreted by the appellant. The local tax rate in *Ashland* was higher than the average rate as fixed by the tax commission and the income tax assessor sought to meet the difficulty in this manner: He capitalized the portion of the total tax roll realized from the terminals at the local rate of taxation in the city of *Ashland*. In other words, one value was used to determine the tax and then another value was determined from the tax and was added to the assessment. We do not find in the statutes any warrant for this mode of procedure.

There is obviously no requirement in the statutes above quoted that the value of these terminals should be used by the county board or county clerk in the process of apportion-

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ing the taxes. Nor do we find in the other sections of the statutes any such requirement. The local assessor had no duty to perform as to the assessment of these terminals. The assessed value of this property was not included in the reports transmitted to the county clerk which furnish the basis of the apportionment. By sec. 1211—6, Stats. 1919, property of the class to which these terminals belong "is declared to be personal property, and the place of assessment and taxation of such property is fixed at the capital of the state."

It is our conclusion that by virtue of the decisions and statutes above referred to the city of *Ashland* is entitled to the tax derived from these terminals without any impairment directly or indirectly, and that the valuation of the property in question should not have been included in the equalization made by the county board.

By the Court.—Judgment affirmed.

SMITH, Respondent, vs. CITY OF PHILLIPS, Appellant.

March 10—April 5, 1921.

Municipal corporations: Meeting of common council: Adjourned meeting: Time when salaries may be fixed: Ineffectual change: Effect on existing salaries.

1. An informal arrangement by members of a city council at its first regular February meeting, at which the council was required by sec. 925—30, Stats., to fix the salaries of city officers, to postpone action on the salary question, did not make the meeting held at the time for the regular March meeting, and which was shown by the records of that meeting to be the regular monthly meeting of the council, an adjournment of the February meeting.
2. The requirement of sec. 925—30 as to the time for fixing salaries for the ensuing year and that such salaries "shall not be increased or diminished during his term of office," is mandatory, and the action of the council at its March meeting in fixing the salary of the city attorney is not valid.
3. Under a provision of said sec. 925—30 that all salaries fixed by the common council shall remain the salaries of said officers until the council shall otherwise determine, the salary

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of a city attorney, regularly fixed in 1914, remained the salary of the officer elected to that office in 1916, where no change was made by the city council at the meeting in 1916 designated for that purpose by statute, though the salary was reduced at the regular meeting in March, 1916.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover the sum of $425 from the city of *Phillips* for services claimed to be due him as city attorney of said city from May 1, 1916, to September 30, 1917, at the rate of $25 per month.

The case was tried before the court upon the following stipulated facts: That plaintiff was duly elected city attorney at the regular spring election on April 4, 1916, for a term of two years; that on the first Tuesday of March, 1916, the common council of the city of *Phillips* had fixed the salary of the city attorney at $1 a month; that the salary of the city attorney for the two-year period previous to 1916 had been fixed at $25 a month at the first regular meeting of the council in February, 1914; that plaintiff qualified as city attorney, but the city employed another attorney to represent it in various issues; that the common council refused to pay plaintiff's claim for $425, but tendered him instead the sum of $17 as payment in full for seventeen months; that he refused this and brought this action in circuit court.

The court ordered judgment for the plaintiff, from which judgment defendant appeals.

For the appellant there were briefs by *W. K. Parkinson* and *J. V. Ledvina,* both of Phillips, and oral argument by *Mr. Parkinson.*

For the respondent the cause was submitted on the brief of *T. M. Holland* of Park Falls.

SIEBECKER, C. J. The stipulated facts show that the common council of the city failed to provide any salary for the city officers and employees at the regular February, 1916, meeting, and that such meeting was not adjourned to a fu-

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ture date. It appears that the informal arrangement by the members of the council at the February, 1916, meeting to postpone action on the salary question did not constitute an adjournment of the February meeting, and hence there is no basis for the claim that the regular March, 1916, meeting was an adjourned meeting of the regular February, 1916, meeting. The records of the March, 1916, meeting show that it was the regular monthly meeting of the council. The result is that the common council at its regular March, 1916, meeting proceeded to fix the salaries for the city officers to be elected during the ensuing year. The question arises, Had the common council the power to do this in view of the terms of sec. 925—30, Stats., which provides:

"The common council shall by ordinance provide such salary or compensation for the officers and employees of the city as it shall deem proper. . . . The council shall, at its first regular meeting in February, fix the amount of salary which shall be received by every officer entitled to a salary, who may be elected or appointed during the ensuing year, which shall not be increased or diminished during his term of office and which shall be paid out of the city treasury at the end of each month. All salaries heretofore fixed by any council or established by law shall be and remain the salaries of such officers until the council shall otherwise determine."

The terms of this statute are positive and indicate that the legislature intended that the common councils of cities are required to fix the salaries of city officers at this first regular meeting in February. Manifestly it was considered the best municipal policy to remove the question of compensation of city officers from the influence of the municipal election which follows early in April. This idea of freeing the salary question from municipal political influence is also guarded by forbidding any increase or diminution of such fixed salary during the term of any such officer. We are of the opinion that the circuit court correctly held that the terms of this statute are mandatory, and require city councils to fix the amount of the official municipal salaries at the regular meeting in February. Since the council of the defendant

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city at its regular February, 1916, meeting failed to fix the salary of the city attorney who was elected during the ensuing month of April, the question arises, Is the plaintiff entitled to the salary the common council had fixed for the city attorney at its regular meeting in February, 1914? The trial court held that he was, upon the ground that sec. 925—30, Stats., provides: "All salaries heretofore fixed by any common council or established by law shall be and remain the salaries of such officers until the council shall otherwise determine." So far as our attention has been cited to the statutes, this is the only statutory provision prescribing a salary for city officers in case the common council omits to provide a salary at its regular February meeting for an officer who may be elected or appointed during the ensuing year. We are persuaded that this statute applies to the instant case. It therefore follows that plaintiff was entitled to the salary fixed by the defendant's council for the office of city attorney at the regular meeting in February, 1914, at the amount of $25 per month. The court properly awarded plaintiff a recovery against defendant for $425 and the costs of action.

By the Court.—The judgment appealed from is affirmed.

PEAVEY, Appellant, vs. LOVELAND and others, Respondents.

March 10—April 5, 1921.

Frauds, statute of: Guaranty: Valuable consideration: Assignments: Form of judgment.

1. Where one on the strength of a defective agreement in good faith parts with a valuable consideration which enriches the promisor, a court of equity will enforce the agreement, though it requires the lifting of it out of the statute of frauds; and this principle applies to a guaranty of a note where the guarantor received and retained a valuable consideration.
2. At common law, in case of an assignment, the action must be in the name of the assignor though the judgment will inure to the benefit of the assignee.

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3. The guarantor of a note secured by a mortgage cannot complain that a personal judgment against him on his guaranty was taken in form in favor of the payee, although the payee had assigned the note, mortgage, and judgment of foreclosure to a trustee. Both being parties and consenting to the form of judgment, payment thereunder would protect the guarantor.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Consolidated actions to foreclose a mortgage and to enforce the personal liability of the guarantor of the payment of a note for $5,000. The written guaranty read: "I hereby guarantee payment of the within note and mortgage before and after maturity. *H. H. Peavey.*" The consideration for the guaranty was the assignment to *Peavey* by the payee of the note, *Loveland,* of a one-half interest in notes other than the one guaranteed, aggregating $10,000, secured by the same mortgage which *Peavey* has foreclosed in this action, consolidated with *Loveland's* foreclosure action of the same mortgage, and in which the trial court found that he was personally liable on the guaranty, and that upon the payment of the note of $5,000 his interest in said foreclosure judgment should be increased by said amount.

After *Loveland* foreclosed the judgment he assigned the notes and mortgage and the judgment to *Heegard,* trustee, who was a party to the action. Plaintiff appealed.

For the appellant there was a brief by *Walsh & Morris* of Washburn, and oral argument by *Charles F. Morris.*

For the respondents the cause was submitted on the brief of *Williams & Foster* of Fond du Lac and *A. W. MacLeod* of Washburn.

VINJE, J. The facts are not set forth fully because the appeal raises only two material questions that could well be stated abstractly. The first is whether there has been such an execution of the agreement on the part of *Loveland* by the transfer to *Peavey* of a one-half interest in the $10,000 notes as to lift the guaranty out of the statute of frauds.

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It is a familiar principle that where one on the strength of a defective agreement in good faith parts with a valuable consideration which enriches the promisor, a court of equity will enforce the agreement though it requires the lifting of it out of the statute of frauds. *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1. There the question was whether a written guaranty reading "I hereby guarantee the payment of the within note," signed by one Smith, was enforceable against him. It was held that it was not because no consideration moved to him out of the original transaction and no separate consideration was claimed or proven. In the case at bar not only is there a separate consideration shown, but it is undisputed that *Peavey* was a party to and profited by the original transaction. Indeed, the trial court found that he was guaranteeing his own debt. We do not pass upon the correctness of the latter finding, as we prefer to rest our decision upon the ground that the guarantor accepted, retained, and still insists upon retaining the benefits of a valuable consideration that enriched him and to that extent impoverished the promisee.

Counsel for appellant relies upon *Commercial Nat. Bank v. Smith,* 107 Wis. 574, 83 N. W. 766, in which the same guaranty was passed upon and held void for the reason that the evidence or proffered proof showed no consideration moving to Smith. It is there said:

"The plaintiff bases its contention upon *Dyer v. Gibson,* 16 Wis. 557, and subsequent cases, wherein it is held that the promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing subscribed by him and expressing the consideration. The difficulty we find with the plaintiff's case is that, admitting all the facts alleged to be true, they do not bring this case within the rule above stated." Page 577.

In the present case the proof brings it clearly within the rule because of the valuable consideration shown by the evi-

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dence to have passed from *Loveland* to *Peavey*. See, also, *Grace v. Lynch,* 80 Wis. 166, 49 N. W. 751; *Phillips v. Holland,* 149 Wis. 524, 136 N. W. 191. That such evidence was admissible is also held in *Dyer v. Gibson,* 16 Wis. 557.

The second question is, Can *Peavey* justly complain because the personal judgment on the guaranty was taken in form in favor of *Loveland?* Since the assignee of the judgment of foreclosure was a party to the action and does not complain because the judgment for the deficiency was taken in form in favor of *Loveland, Peavey* is not injured. He owes either one or the other, and, both being parties to the action and consenting to the form of the judgment, payment to *Loveland* protects him from payment to *Heegard,* the trustee. At common law the action must have been in the name of the assignor of the judgment and the judgment he obtained inured to the benefit of the assignee.

The material findings made by the trial court were sustained by the evidence and the correct legal result was reached.

By the Court.—Judgment affirmed.

SEITZ, Respondent, vs. OTT, Appellant.

March 10—April 5, 1921.

Highways: Pedestrian walking in road: Duty to look behind: New trial because of misleading instructions: Discretion of court.

1. In an action for personal injuries by a pedestrian struck by a team overtaking her on the road, wherein it appeared that after she became aware of its approach at a distance of 600 feet she thought she could hear it in time to step aside, but looked back twice before she was struck, as she contended, without hearing it, the court properly ruled that the law did not require her to keep a further lookout under the circumstances.
2. An order granting a new trial because an instruction, although technically correct, was so stated that it might have misled the jury, is not based on a misapprehension of the law, and the order is controlled by the rule which ordinarily obtains when a new trial is granted in the discretion of the court.

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APPEAL from an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Personal injury. The action was for damages alleged to have been caused by the defendant negligently driving his horses and sleigh against and over plaintiff, a school teacher, who was proceeding along a country highway in the winter time, traveling in the same direction as the plaintiff. The answer denied the negligence of the defendant and alleged that the plaintiff was negligent. The jury, by special verdict, found that the defendant was guilty of negligence proximately causing the injury and that the plaintiff was also guilty of negligence which contributed proximately to her injury, and fixed the damages at $1,650. After verdict there was a motion by the defendant for a judgment in his favor and by the plaintiff for a new trial. The court ordered a new trial upon payment of costs of the former trial, upon the ground that the finding of the jury that the plaintiff was negligent was against the weight of the evidence and "that the court probably misled the jury by the nature of the instruction to the jury on the same question." From the order granting the new trial the defendant appeals.

The cause was submitted for the appellant on the brief of *Regner & Ringle,* attorneys, and *Bird, Okoneski & Puchner,* of counsel, all of Wausau, and for the respondent on that of *Brayton E. Smith,* attorney, and *Brown, Pradt & Genrich,* of counsel, all of Wausau.

ROSENBERRY, J. The plaintiff, a teacher in a country school, was walking home on the right side of the traveled track of a country road in the winter time, going south, there being quite a little snow on the ground. The defendant approached the plaintiff from behind with a team and a sleigh on his way home. The plaintiff saw the team approaching when it was a considerable distance from her, so far that she did not care to step out of the road at a cross-road and wait for it to pass. When the plaintiff reached the cross-road the defendant was about 600 feet

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behind her. The plaintiff thought that she could hear the defendant when he approached her in time so that she might step aside and permit the defendant to pass. The plaintiff looked back twice to see whether the team was coming near to her.

It was agreed upon the trial and the jury was instructed that as a matter of common knowledge it was the custom in that part of the country, Marathon county, for a foot traveler to get out of the wagon ruts or sleigh ruts when a team approaches. The plaintiff failed to hear the team and remained on the track and was run into, knocked down, and injured. Upon the trial the court instructed the jury as follows:

"It was the plaintiff's duty, in proceeding on foot along the traveled track, to keep a reasonable lookout for the approach of vehicles to the same extent and in the same way as such travelers ordinarily do under like circumstances and to discover any vehicle approaching which she could reasonably discover by using such care. And it was her duty to step out of the way of any team and sleigh which she knew, or ought to have known, was approaching in the traveled track in such a way as to threaten collision with her. But if there was no warning of the approach of defendant's team and sleigh, and if the plaintiff used reasonable care and caution in respect to keeping herself informed of any such approach, then it cannot be said that she failed to use ordinary care for her own safety. In general, it was her duty to keep such lookout and use such care for her own safety as the ordinarily careful foot traveler usually used under circumstances the same as or like unto those in which she was proceeding along the highway."

Upon the motion to set aside the verdict and for a new trial the court said:

"The court probably misled the jury by the instructions respecting the duty of the plaintiff to keep a reasonable lookout for the approach of vehicles. True, it was not stated to the jury that the pedestrian was under obligation to keep a reasonable lookout for the approach of vehicles from the rear, and the statement of the duty to keep a lookout is

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qualified by the phrase 'in the same way as such travelers ordinarily do under like circumstances.' Nevertheless, the attention of the jury was directed toward a supposed duty existing in the case to keep a lookout. If she had no duty to keep a lookout to the rear, then the instruction was not applicable to the case and in all probability misled the jury. And it seems unreasonable to say that under the circumstances here present the plaintiff was under obligation to keep further lookout for the approach of a team and sleigh from the rear."

It is the contention of the appellant that the trial court erred in granting a new trial because the order was based upon a misapprehension of the law and therefore not controlled by the rule which ordinarily obtains in cases where the order is made in the discretion of the trial court. *Schillinger v. Verona,* 85 Wis. 589, 55 N. W. 1040; *McCann v. Ullman,* 109 Wis. 574, 85 N. W. 493.

We are of the opinion that the order granting a new trial was not based upon a misapprehension of the law and that the trial court was correct in his conclusion that, although the instruction may have been technically accurate, it was so stated that it might have misled the jury. It was because the court correctly apprehended the law that he thought the phrasing of the instruction was misleading.

By the Court.—Order affirmed.

BRUNO, Appellant, vs. HICKMAN and others, Respondents.

March 11—April 5, 1921.

Assault and battery: Inadequate damages: Witnesses: Proof of conviction of criminal offense: Purpose: Motion to change venue: Not proper after verdict and before new trial granted.

1. Where defendants assaulted plaintiff and beat him into unconsciousness, causing a scalp wound which bled profusely and reopened about six months afterwards, plaintiff being in bed from the assault for twenty-seven days and under a doctor's care for six months, and though strong and healthy

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prior to the assault was not subsequently in good health and could not work regularly or command a man's pay, and had pains in his head quite often, a verdict for $60 was wholly inadequate.

2. Under sec. 4073, Stats., authorizing proof of a conviction of a criminal offense to affect the credibility of a witness, a defendant sued for assault may be asked on cross-examination whether he was convicted for committing such assault, and the question, being competent to affect his credibility, cannot be excluded because of its irrelevancy on the question whether the assault was committed.

3. Plaintiff's motion for a change of the place of trial at the same time that he moved for a new trial was not timely made, though it will be proper to make this motion in advance of another trial after a new trial has been granted.

APPEAL from a judgment of the circuit court for Clark county: E. C. HIGBEE, Judge. *Reversed.*

Action to recover damages for assault and battery. The jury returned a verdict in favor of the plaintiff for $60. From a judgment entered thereon plaintiff brings this appeal.

Andrew Gilbertson of Milwaukee, for the appellant.

For the respondents there was a brief by *Rush & Devos* of Neillsville, and oral argument by *W. J. Rush.*

OWEN, J. The evidence shows that in the evening of October 14, 1916, the defendants assaulted and beat the plaintiff, rendering him unconscious. The affray took place at a country dance. The plaintiff was taken home in an unconscious state. He had a scalp wound, evidently caused by some blunt instrument, and was bleeding profusely. He was sick in bed for twenty-seven days. He was under a doctor's care for six months. There was a reopening of the wound about six months after the injury. He was thirty-three years of age, and prior to the assault was a strong, healthy man. He has not been in good health since the assault, according to his testimony and that of his parents. He does not work regularly, and has not commanded

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a full man's pay. He has pains in his head quite often. Prior to the assault he had no pains or trouble with his head. The jury brought in a verdict for the plaintiff and assessed his damages at $60. This was less than $2.25 a day for the time he was actually sick in bed, to say nothing of his period of convalescence, his pain and suffering, his impaired condition of health, his impaired earning power, or of his expenses for medicines and medical services.

It is true that the evidence bearing upon the question of damages is somewhat meager. We find no evidence concerning the extent of plaintiff's pain and suffering, concerning his earning power, nor the length of time during which he was completely incapacitated for work, nor the amount of time he has lost by reason of his impaired health, nor the amount of his expense for medicines and medical care. But even this meager state of the record cannot justify the grossly inadequate damages assessed by the jury. If the plaintiff was entitled to recover at all, certainly upon what does appear in the record he was entitled to recover much more than $60. The $60 would not be exorbitant damages for the loss of time during which he was actually confined to his bed. The opening of the wound about six months thereafter indicates pretty conclusively that the injurious results of the assault did not terminate with his rising from bed. By no reasonable assumption can his loss of time be measured by that period during which he was actually confined to his bed. The testimony concerning the impaired condition of his health and his impaired earning power is not disputed. That he must have suffered pain is a matter of common knowledge.

The plaintiff made a motion to set the verdict aside on the ground that it was perverse. We think the motion should have been promptly granted. A verdict for $60 for damages such as the evidence shows the plaintiff sustained is wholly inadequate, as a matter of common knowledge. Such ver-

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dicts bring reproach to the jury system and, if allowed to stand, lessen respect for courts. No court should lend its approval to such a palpable miscarriage of justice.

A question relating to the admissibility of evidence should be considered. Upon cross-examination plaintiff's counsel propounded to one of the defendants this question: "Were you convicted at the last term of the circuit court here for committing an assault upon this plaintiff, *Basil Bruno*, at the time referred to in this—?" Objection made to the question at this point was promptly sustained by the court. This question was proper and the answer should have been received. Sec. 4073, Stats., authorizes proof of a conviction of a criminal offense for the purpose of affecting the credibility of a witness. This proof may be made by way of cross-examination of the witness himself or by introduction of the judgment of conviction. *Farrell v. Phillips*, 140 Wis. 611, 123 N. W. 117. Of course such evidence is not admissible as bearing upon the question of whether the defendant in fact committed the assault. It is only admissible for the purpose of affecting the credibility of the witness, and the jury should be plainly and carefully instructed to that effect. The court evidently excluded the evidence because of its manifest irrelevancy to the question of whether the assault had been committed. However, the statute makes the evidence admissible as affecting the credibility of the witness, and if proffered evidence is admissible for any purpose it cannot be excluded. Such evidence was held admissible under a similar statute in *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586, and in view of the provisions of sec. 4073 we think its exclusion was improper.

The plaintiff moved for a change of the place of trial at the same time that he moved for a new trial. This motion was denied. He assigns this also as error. We shall not consider the merits of the ruling upon this motion. It was not timely made. A motion for a change of the place of trial should be made before and not after the trial. It is a rather

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novel idea that a litigant may move for a change of the place of trial after a verdict has been rendered against him and before a new trial has been ordered. We know of no warrant for such procedure. The case must be remanded for a new trial. It will be proper for plaintiff to make this motion in advance of another trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

KELLAR, Plaintiff in error, vs. THE STATE, Defendant in error.

KLOES, Plaintiff in error, vs. THE STATE, Defendant in error.

March 11—April 5, 1921.

Criminal law: Venue: Proof by circumstantial evidence: Judicial notice of geographical facts: Witnesses: Husband and wife: Privileged communications: Harmless error.

1. While it is the better practice to prove the venue of an offense by direct evidence, the failure to do so does not bar a lawful conviction where the venue laid can be inferred from circumstances.
2. This court judicially knows that Rhinelander is the county seat of Oneida county and that there is a town of Three Lakes and a postoffice of the same name in that county; and since the evidence shows that an offense was probably committed at the summer resort of one of the defendants situated at Big Lake, which was six miles from Three Lakes postoffice, and official maps show a Big Lake in Oneida county and none in any other county within a radius of ten miles from Three Lakes, it is *held* that the venue was sufficiently established.
3. On the trial of a man and woman for adultery and fornication, the testimony of the man's wife that when she told him she was ready to come home from a visit he telephoned her to stay a while longer, that she thought the female defendant had enticed him away from her, and that she and her husband had trouble over the matter, was partly privileged as relating to private communications and partly incompetent, but its admission was not prejudicial, where it was admitted that the husband was at the female defendant's resort and he testified to trouble with his wife because he stayed there.

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ERROR to review a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

The plaintiffs in error, *Harry Kellar* and *Anna Kloes,* hereinafter called the defendants, were respectively convicted of the offense of adultery and fornication. *Harry Kellar* was a married man and *Anna Kloes* a widow. To review such conviction they obtained separate writs of error, but by consent they are tried as one since both depend upon the same evidence and rulings of the court.

For the plaintiffs in error there was a brief by *Martin, Martin & Martin* of Green Bay, attorneys for *Anna Kloes,* and *H. F. Steele* of Rhinelander, attorney for *Harry Kellar,* and oral argument by *Gerald F. Clifford* of Green Bay.

For the defendant in error there was a brief by *A. J. O'Melia,* district attorney of Oneida county, and oral argument by *Mr. O'Melia* and *Mr. J. E. Messerschmidt,* assistant attorney general.

VINJE, J. It is earnestly urged that the evidence does not sustain the conviction. It is true that there is no direct evidence of the offense, but the facts and circumstances furnish a sufficient basis for the jury's finding. The trial court was satisfied therewith and we cannot say, in view of such finding and approval, that we entertain any serious doubt as to its correctness. It would not profit the legal profession to set out the evidence which furnishes a sufficient warrant for the result reached by the jury. A conclusion as to the probative force of evidence is necessarily reached by a consideration of *all* the evidence. Hence to justify such conclusion all the evidence, or at least the substance thereof, must be stated. To do so is a laborious task, which when done is seldom of any future use. In the opinion of the writer it is therefore a far better practice for judges, in these busy days when the profession is literally inundated by a mass of legal opinions, to save their own time and energy for the study and exposition of questions of law,

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than to spend it in the detailed statements of facts that are generally valueless as legal precedents because no other case is likely to present the same facts. It should not be inferred from this, however, that a statement to the effect that the evidence is held sufficient to sustain a finding or verdict is one lightly made, or that it may not have required hours or days of arduous toil to determine whether or not it can be justly made. That this court is mindful of its duty in this respect, especially in criminal actions, such cases as *Gerke v. State,* 151 Wis. 495, 139 N. W. 404; *Bianchi v. State,* 169 Wis. 75, 171 N. W. 639; and *Bruno v. State,* 171 Wis. 490, 177 N. W. 610, abundantly testify.

No direct proof of venue was made and it is claimed that the defendants should be discharged on that ground. It is the better practice to prove venue by direct evidence, but failure to do so does not bar a lawful conviction where the venue laid can be inferred from circumstantial evidence. Corpus Juris states the rule thus:

"Venue may, like any other fact, be established by proof of facts and circumstances from which it may be inferred, direct evidence not being necessary. This is especially true where no direct issue as to the place where the offense was committed is made on the trial except by the plea of not guilty, and all persons concerned seem to take the venue as for granted, and the evidence incidentally given strongly tends to show that the venue was properly laid, and there is no evidence to the contrary. So where no witness expressly states that the crime was committed in the county as charged, but there are references in the evidence to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they reasonably may have concluded that the offense was committed in the county alleged, the venue is sufficiently proved." 16 Corp. Jur. 769 and cases cited in notes.

The evidence in this case comes well within the rule above stated. No issue was made on the venue by the evidence. It showed that the offense was probably committed at the summer resort of the defendant *Anna Klocs*

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located at Big Lake; that Big Lake was in the town of Three Lakes; that there was a village of Three Lakes located about six miles from the *Kloes* resort; that when *Anna Kloes* was accused of unlawfully having venison at her resort she wanted to go to Rhinelander to plead guilty. Judicially we know that Rhinelander is the county seat of Oneida county; that there is a town of Three Lakes in Oneida county and that there is a postoffice by the name of Three Lakes in Oneida county. 16 Cyc. 860, 861; *Smitha v. Flournoy's Adm'r,* 47 Ala. 345; *Central R. & B. Co. v. Gamble,* 77 Ga. 584, 3 S. E. 287. *Mrs. Kloes* testified that her resort was at Big Lake in Three Lakes. Since the evidence shows that it was about six miles from the postoffice of Three Lakes, it must have been in the town of Three Lakes. Official maps of the state, such as the railroad map and the map of Wisconsin showing geology and roads by W. O. Hotchkiss, state geologist, published under direction of the Wisconsin Geological and Natural History Survey, show a Big Lake in Oneida county. Such maps fail to show any other Big Lake in any other county within a radius of ten miles or more from the postoffice of Three Lakes in Oneida county. It follows that both by circumstantial evidence and direct evidence, taken in connection with facts of which the court can take judicial notice, the venue was sufficiently proven. In so holding we do not take into account the evidence as to venue taken by the court after the jury was discharged. It is questionable whether such evidence was proper.

The wife of *Harry Kellar* was allowed to testify on behalf of the state to the effect that while *Kellar* was at the *Kloes* resort she was at Oshkosh on a visit, her home being at Rhinelander; that she told him she was ready to come home, but he telephoned her to stay a while longer; that she thought *Anna Kloes* had enticed him away from her and that she and her husband had trouble over the matter to such an extent that he once struck her nose so that it was severely injured. The blow was made in the presence of their daughter

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Elaine, who also testified to it. The evidence of *Mrs. Kellar* was partly privileged because it related to private communications between husband and wife, and partly incompetent or immaterial, such as her belief that *Anna Kloes* enticed him away from her. But we fail to find prejudicial error. That *Kellar* was at the *Kloes* resort was admitted on the trial by both defendants and he also testified to trouble with his wife because he stayed there. On the whole record we find no error.

By the Court.—Judgment affirmed.

KITTELSON, Appellant, vs. DETTINGER and others, Respondents.

March 11—April 5, 1921.

Schools and school districts: Consolidation: Notice of meeting: Failure to sign order of consolidation: When district is organized: Construction of statutes authorizing consolidation.

1. Where the notice of a meeting of town boards for the purpose of consolidating two school districts, left with the clerk of one of the districts under sec. 40.04, Stats., failed to state the time of the meeting, a finding of the trial judge that due notice was given is supported by evidence that the person serving the notice had with him another paper in which the blanks were properly filled which he read and repeated to the clerk, and establishes the fact that the town boards gained jurisdiction to proceed.
2. Where town boards made an order consolidating school districts, copies of which were filed with the town clerks, county superintendent, and school district clerks, and notice of the first district meeting was made and signed as provided in sec. 40.02, Stats., and such meeting was held and officers elected who filed acceptances, the district was organized on the date of such first meeting, within the meaning of sec. 40.03, providing that a district shall be deemed legally formed when duly organized and exercising the rights and privileges of a district for four or more months and that no appeal or action attacking the legality of the formation of the district shall be taken after such period.

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3. Under sec. 40.02, providing that town boards creating or consolidating school districts shall make a "written order," the failure of the individual members of the town boards to sign an order consolidating the districts, duly made and filed, if an irregularity, was not a jurisdictional defect fatal to the organization of the district.
4. Though the statutes must be complied with in acquiring jurisdiction to consolidate school districts, they will not be construed so strictly that unimportant mistakes in subsequent proceedings will defeat the wishes of the communities affected or the purpose for which the statutes were enacted.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an appeal from a judgment sustaining the action of town boards in consolidating two school districts into one school district, now known as Joint School District No. 5 of the towns of Northfield and Garden Valley, and also sustaining the action of the committee on common schools of said county and the organization proceedings in said consolidated school district. Equitable relief was sought by the plaintiff to set aside the proceedings for the reason that the same did not comply with the statutes.

Ole J. Eggum of Whitehall, for the appellant.

For the respondents there was a brief by *Hull & Jedney* of Black River Falls, and oral argument by *E. S. Jedney.*

JONES, J. The most serious objection made by appellant's counsel to the proceedings for the consolidation of the two school districts is that no sufficient notice was given to the clerks of the districts concerned pursuant to sec. 40.04, Stats. Considerable testimony was given relative to the notice given to Mrs. Johnson, clerk of one of the districts. A notice was left with her in which the blanks as to the time of the proposed meeting were not filled. The witness who served the notice explained the circumstances under which the incomplete notice was left, and testified that he had with him another paper in which the blanks were properly filled and which he read and repeated to Mrs. Johnson. There

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was some conflict in the testimony on this subject, but the trial judge found that due notice was given of the meeting to the clerks of the districts affected, and that a return of such service was made and filed. This finding is based on ample evidence and establishes the fact that the town boards gained jurisdiction to proceed.

At the time specified in the notice the town boards met for the purpose of considering and determining the matter of the consolidation. At this meeting all the members of the school boards affected by the proposed consolidation were present and arguments for and against the proposal were heard by them. At this meeting the minutes show, and the court found, that it was determined by the two town boards to consolidate the two school districts. The court further found that an order of consolidation of the districts was then made and entered by the town boards and that within ten days copies of the same were filed in the offices of the respective town clerks, with the county superintendent, and also with the clerk of each school district affected. The court further found that on October 7, 1919, the town boards made and signed a notice of the first district meeting of the consolidated school district as provided by sec. 40.02, Stats. The findings state the manner in which the notice was given to all the qualified voters, men and women, of the consolidated district, and the procedure seems to have been in compliance with the statute. The person who served the notice kept a record of the persons notified and made due return thereof and the record and certificate of service were recorded by the district clerk selected at the first meeting and made a part of the permanent records.

On October 30, 1919, the first district meeting of the consolidated school district was held and the three school officers were elected and filed with the clerk their acceptances of the offices, and the acceptances were recorded as part of the permanent records of the meeting. After this other meet-

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ings were held from time to time, at which, among other things, levies were made on the taxable property of the joint district for carrying on schools during the current year. A building site was selected and resolutions were passed determining the general plan of the building. Action was taken to secure a loan of $20,000 from the state trust fund for the building and to levy the necessary taxes therefor.

In this connection sec. 40.03 seems to us important and decisive of the case. The section provides as follows:

"A district shall be deemed organized when any two of the officers elected at its first legal meeting file with the clerk and cause to be recorded in the minutes of such meeting their written acceptance of the offices to which they have been respectively elected or when said officers shall have failed for a period of ten days or more to state their refusal in writing. A district shall also be deemed legally formed when it has been duly organized and has exercised the rights and privileges of a district for a period of four or more months, and no appeal or other action attacking the legality of the formation of such district, either directly or collaterally, shall be taken after such period has expired."

Unless there had been some fatal defect before the acts purporting to organize the district, it was formed on October 30, 1919, the date of the first meeting above mentioned, and it has since exercised the rights and privileges of its organization. This action was commenced May 1, 1920, more than four months afterward. The consolidation of school districts is an important matter. Such districts have very considerable power and the interests of many citizens are affected thereby. The legislature doubtless deemed it important that questions of legality affecting the proceedings should be settled with reasonable dispatch, and assumed that four months would afford sufficient time for bringing actions to test such legality. An appeal under sec. 39.13 from the order of consolidation was taken by one of the inhabitants interested to the committee on

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common schools. This was decided January 30, 1920, and the action of the town boards was affirmed. This proceeding was abandoned and had no connection with the present action. In *Application of Clark,* 135 Wis. 437, 115 N. W. 387, this court held that a party was precluded from maintaining his action to question the validity of a proceeding to incorporate a village because he had not commenced it within three months, the statutory limitation. In connection with this phase of the case it is proper to consider an objection made by appellant's counsel that the order of consolidation made by the town boards was not signed by the members. As we have seen, the court found that the order was made and duly filed. The minutes of the meeting show that the vote for consolidation preceding the order was duly taken. The statute, sec. 40.02, does not in terms provide that it shall be signed, but it must be a "written order."

It would doubtless have been better practice if the individual members had signed the order, but since the statute does not so prescribe we are disposed to hold that, if it was an irregularity, it was not jurisdictional, and not fatal to the subsequent proceedings for the organization of the district.

Appellant's counsel have made and ingeniously argued several other objections to the proceedings taken by the town boards and the consolidated district, but we do not consider that the objections go to matters of jurisdiction and it does not seem necessary to consider them. The town boards clearly gained jurisdiction; the proceedings seem to have been conducted fairly; all persons interested had notice and full opportunity to be heard; and so far as the record shows the consolidation was desired by a large majority of those interested. There are many steps prescribed by the statutes in carrying through these proceedings; so many that it would seem to be somewhat remarkable for a layman to conduct one of them from

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beginning to end without some clerical or technical errors. Although the statutes must be complied with in acquiring jurisdiction, we are not inclined to construe them so strictly that unimportant mistakes in subsequent proceedings will defeat the wishes of the communities affected or the purpose for which the statutes were enacted. *State ex rel. Taylor v. McKinny,* 146 Wis. 673, 132 N. W. 600.

Counsel for the respondents argued that this action could not be maintained because the appellant had suffered no irreparable injury and because his proper remedy was an appeal to the state superintendent of schools. It is unnecessary to decide these questions.

By the Court.—Judgment affirmed.

OWEN, J. (*concurring*). I concur in the result solely on the ground that the action was barred by the provisions of sec. 40.03, Stats. I do not think the manner of serving the notice constituted a notice in writing within the meaning of the Statutes. I think it should have been squarely stated in the opinion that the unsigned order of the town boards did not constitute a compliance with sec. 40.02.

LINDEMUTH, Respondent, vs. PHILIPP, Governor, and others, Appellants.

March 12—April 5, 1921.

Soldiers' bonus law: Resident registering in another state.

Under the Soldiers' Bonus Law (ch. 667, Laws 1919), granting a bonus to "each soldier, sailor, marine, and nurse . . . who at the time of his or her induction into the service was a resident of Wisconsin," a resident of this state registering in Michigan pursuant to a letter received from a Michigan registration board and there inducted into the service is entitled to the bonus.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

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This is an action of *mandamus* brought by plaintiff, a soldier in the world war, to compel the defendants, constituting the Service Recognition Board, to issue to plaintiff a certificate of disbursement drawn upon the treasurer of the state of Wisconsin in the sum of $121.33, under the provisions of the so-called Soldiers' Bonus Law (ch. 667, Laws 1919). From a judgment of the circuit court awarding a peremptory writ of *mandamus* defendants bring this appeal.

For the appellants there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the respondent there was a brief by *Pickering & Rieser* of Superior, and oral argument by *R. M. Rieser.*

OWEN, J. Plaintiff was inducted into the military service of the United States on the 15th day of July, 1918, at Gaylord, Michigan, where he resided with his parents prior to the month of April, 1916. He was unmarried. His business was that of a locomotive fireman, and during the month of April, 1916, he went to Superior seeking employment. He found employment, took up his residence at Superior, has continued to reside there ever since, and has exercised all the rights of citizenship, having voted at the municipal election in that city in the spring of 1918. He registered under the United States selective service act June 5, 1917, at Gaylord, Michigan. He did this pursuant to a letter which he received from the registration board at that place. He supposed that was the proper place for him to register. He claims he is entitled to the so-called bonus provided by ch. 667, Laws 1919. The benefits provided by the act are made payable to each "soldier, sailor, marine, and nurse, including Red Cross nurses, who served in the armed forces of the United States during the war against Germany and Austria, and who at the time of his or her induction into the service was a resident of Wisconsin." The defendants, constituting the Service Recognition Board

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created by said act, deny his right thereto because they claim he was not a resident of the state of Wisconsin, within the meaning of that act, at the time of his induction into service. They claim that the residence contemplated by the act is a military residence, and that such residence was definitely and irrevocably fixed at Gaylord, Michigan, by the applicant himself when he there registered under the selective service act.

Did the legislature have in mind a distinction between a military and an ordinary actual residence? If so, was it intended that applicants for the benefits of the act should respond to the test of a military rather than an actual residence? Obviously, this distinction could not have been in mind so far as nurses are concerned, for it will not be contended that they had a military residence. As to them, the law evidently means just what it says. Every nurse who had an actual residence in the state when inducted into service, every Red Cross nurse who had an actual residence in the state when she became a part of the Red Cross organization, became entitled to the benefits of the act. As to that we apprehend there is no dispute. Now if a different test is to be applied to soldiers, sailors, and marines, should it not be so declared, or at least intimated, in and by the terms of the act? There is not a single word in the act to suggest that such a distinction was in the legislative mind. The residence of the soldier, the sailor, and the marine is to be tested in exactly the same way that the residence of the nurse is tested. If the legislature did have such a distinction in mind, is it too much to assume that it would have been pretty clearly indicated in the act itself? If it intended one kind of residence for a nurse and another for a soldier, would it have trusted to a different construction of identical language to reveal such intent? We are not disposed to impute to the legislature such hazardous and uncertain manner of expression. If in drafting this act the legislature intended the residence of the soldier to be fixed as of the time and by the act of registration, it very effectually obscured

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such purpose by the use of the language "who at the time of his or her *induction into the service* was a resident of Wisconsin." These words indicate an appreciation on the part of the legislature that the question of residence must be referable to some definite time. It could have fixed it as of the time of registration and provided that the place of registration should be conclusive upon the question of residence for the purposes of the act. On the contrary, it is plainly declared that to be entitled to the benefits of the act the applicant must have been a resident of the state "at the time of his or her induction into the service." The time of registration and the time of induction into service were by no means coincident. There was ample time between the two events to enable one to acquire or abandon a residence in the state. No doubt the legislature had this in mind and deliberately bestowed the state's appreciation upon those who had recently acquired rather than those who had recently abandoned their residence here. In this there was manifest propriety and justice. This token of appreciation was based on the sentiment that those who occupied the status of citizens or residents of the state had special claims upon its gratitude. The legislature had to choose between those who had come into the state and those who had left the state during the interim between registration and induction into service. If the fact of residence was determined as of the date of registration, those who had left the state before induction into service and between whom and the state the reciprocal duties and privileges of citizenship no longer existed would be the beneficiaries of the act, while those who took up their residence in the state during such period, most of whom, at least, were citizens of the state at the time of the passage of the act and would be required to contribute to the fund, would be denied the benefits thereof. The legislature was required to choose between those two classes—between its present and its past citizens. In according the preference to its present citizens, those who, as a class, will be subjected to a portion of the

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burden imposed as well as the benefits provided by the act, a measure of justice and propriety would seem apparent.

We feel that we have said much to demonstrate the obvious. The sole question is whether the residence of the applicant is to be determined as of the date of registration or induction into service. The act plainly says the latter. In view of the fact that the date of registration could have been as easily declared, if such had been the legislative intent, we see no reason or excuse for ascribing to the language other than its usual and ordinary meaning. The peremptory writ of *mandamus* was properly granted.

By the Court.—Judgment affirmed.

MEATH, Plaintiff in error, vs. THE STATE, Defendant in error.

March 12—April 5, 1921.

Receiving stolen goods: Necessity of guilty knowledge: Proof by circumstantial evidence: Instructions: Prejudicial error.

1. In a prosecution under sec. 4417, Stats., for buying, receiving, concealing, or aiding in the concealment of stolen property knowing the same to be stolen, it is essential to a conviction that the jury shall find beyond a reasonable doubt that the receiver knew or had a guilty belief that the property was stolen. It is not sufficient that the evidence convinces the jury beyond a reasonable doubt that defendant ought to have known that the property was stolen, but it must go further and satisfy them that he knew or believed the property was stolen.
2. In a prosecution for such offense, guilty knowledge or its equivalent, guilty belief, may be proven by circumstantial evidence.
3. An instruction which warranted the jury in finding a verdict of guilty if they believed the facts and circumstances were such that the defendant, in the exercise of ordinary diligence, ought to have known an automobile was stolen, is erroneous (*State v. Jacobs*, 167 Wis. 299, explained); and in this case, where the evidence is largely dependent upon the testimony of the thief, it was prejudicial.

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ERROR to review a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

August 3, 1920, one Vern Reynolds stole a Buick automobile at Menomonie, Dunn county, Wisconsin. He drove the car to Glenwood city where he took with him one Higgins. The two drove the car toward New Richmond on the highway passing along the defendant's home a short distance outside New Richmond. The defendant *Meath* was not at home at the time, and the two drove the car further and met defendant, who was driving his own automobile, and the two cars then went to *Meath's* home and stopped on the highway in front of his premises. Some conversation was then had between the three. Reynolds and Higgins then borrowed defendant's car to drive to Glenwood for the ostensible purpose of getting other tires to place upon the stolen automobile, purposing to return the same afternoon to defendant's place. After Reynolds and Higgins left, the defendant drove the car from the highway onto his own premises into his garage and closed the doors.

Reynolds and Higgins were met by the sheriff and deputy sheriff of Dunn county and the owner of the stolen automobile. Later in the afternoon Reynolds accompanied the sheriff, his deputy, and the owner of the car for the alleged purpose of finding the stolen car. They came to *Meath's* premises and made inquiry of him as to a Buick car. He at first denied having seen any and then stated that there was such a car in his garage and that his car had been stolen. The garage was then opened and the car identified by the owner, and at about this time Reynolds admitted that he had stolen the car. He pleaded guilty and was thereupon sentenced for such theft shortly before the trial of this case. Defendant was tried under sec. 4417, Stats., for having received, concealed, and aided in the concealment of the stolen automobile. In charging the jury the court said as follows:

"This last element [viz. guilty knowledge] does not nec-

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essarily call upon you to determine whether or not the defendant knew that Vern Reynolds had stolen the car, but it calls upon you to determine from all the facts and circumstances shown by the evidence whether or not the defendant at the time in question knew or ought to have known that the automobile was stolen property. In other words, if the defendant, with intent to defraud the owner, received, concealed, or aided in the concealment of said property, then the question is this: Did the defendant, at the time he so received, concealed, or aided in the concealment of said property, know that it was stolen property, or did he so receive, conceal, or aid in the concealment of said car under such facts and circumstances that he ought to have known that it was stolen. To satisfy this element of guilty knowledge it is not necessary for the state to prove that the defendant actually knew that Vern Reynolds had stolen the car, but it is sufficient, so far as this element is concerned, if the state has convinced you and each of you from the evidence beyond a reasonable doubt that the defendant, with intent to defraud the owner, received, concealed, or aided in the concealment of said automobile under such facts and circumstances that he ought to have known that it was stolen."

Defendant was found guilty and sentenced, and to review the judgment he sued out this writ of error.

Spencer Haven of Hudson, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *W. T. Doar* of New Richmond, special district attorney, and oral argument by *Mr. Doar* and *Mr. Messerschmidt.*

ESCHWEILER, J. The defendant in error was prosecuted and convicted for a violation of the following statute:

"Section 4417. Any person who shall buy, receive, conceal or aid in the concealment of stolen money, goods or property, *knowing the same to have been stolen,* shall receive the same punishment as is hereinbefore provided for the stealing of such money, goods or property; and in any prosecution for such offense it shall not be necessary to aver or prove that the person who stole the same has been convicted."

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By the express language of this statute an essential element of the offense is that the defendant shall, at the time of his receiving or dealing with the stolen property, know that such property has been stolen. It is as essential that the jury shall, beyond a reasonable doubt, find that he had such knowledge at the time of his transaction with the property as they must that the property was theretofore stolen. Such guilty knowledge, or its equivalent, guilty belief, may be proven by circumstantial evidence, but it is not sufficient that such circumstantial evidence convinces the jury beyond a reasonable doubt that the defendant ought to have known that the property was stolen; it must go a substantial step further and satisfy them that he did know or believe.

The portion of the charge quoted above and of which the defendant in error has complained would warrant a jury in returning a verdict of guilty if they believed that the facts and circumstances of this particular case were such that the defendant in the exercise of ordinary diligence ought to have known that the automobile left with him by Reynolds and Higgins had been stolen.

That guilty knowledge, or its equivalent, guilty belief, is of the gist of this offense has been declared by many decisions, among others the following: *People v. Tantenella* (Mich.) 180 N. W. 474; *People v. Lintz*, 203 Mich. 683, 169 N. W. 918; *People v. Grove*, 284 Ill. 429, 120 N. E. 277; *Weinberg v. People*, 208 Ill. 15, 19, 69 N. E. 936; *State v. Rountree*, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. N. S. 833, with note; 17 Ruling Case Law, 85.

It is argued in support of the charge given by the court that it is warranted by what was said in the case of *State v. Jacobs*, 167 Wis. 299, 301, 166 N. W. 324. In that case, involving a prosecution under the same statute as here, but a portion of the entire charge was printed in the statement of facts. The effect of the entire charge was to convey to the jury the understanding that there must be a finding by

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them of guilty knowledge, but that such guilty knowledge might be found from circumstantial evidence. This appears from the language in that decision (p. 301) in approving of the instruction giving the test of the defendant's guilty knowledge under the facts and circumstances adduced in evidence. Such an instruction as is presented in this case and now passed upon was not before the court in the *Jacobs Case*, and that case therefore is not in point here. If the language in the *Jacobs Case, supra,* could be construed to warrant the giving of such an instruction as here before us, which would warrant a conviction if the jury are merely satisfied that the defendant ought to have known that the property was stolen, then such language must be deemed now modified.

It is urged that in any event such an error in the charge is not, under sec. 3072*m*, Stats., sufficient to warrant a reversal of the conviction and a new trial. The evidence in this case is of such a nature and dependent so largely upon the testimony of the thief that we do not feel justified in saying that; with such a substantial error in the charge to the jury, prejudice did not result to the defendant. His substantial rights were affected, and for that reason there must be a new trial.

Several assignments of error have been urged with reference to the admission of certain evidence concerning the meaning of an expression claimed to have been used by Reynolds at the time the automobile was brought to defendant's premises and also as to a telephone communication alleged to have been had later in the afternoon of the same day between Higgins and defendant. We find no error in the admission of this evidence.

Affidavits were presented on the motion for a new trial as to certain statements alleged to have been made by Reynolds and not known to defendant or his counsel until after the trial. An examination of the same, however, satisfies

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us that none of them were of sufficient materiality to warrant overruling the trial court's decision in that regard.

By the Court.—Judgment reversed.

IN RE ALLEY.

March 12—April 5, 1921.

Parent and child: Right to custody: Infants: Habitual truants: Refusal to attend school: Delinquent children: Commitment to industrial school: Grounds.

1. The right of the father or, in case of his death, of the mother to the custody of a minor, preserved by sec. 3964, Stats., is a substantial right.
2. The provision of sec. 40.73, Stats., relative to compulsory school attendance, that any person proceeded against thereunder may prove in defense his inability to compel a child under his control to attend school and shall thereupon be discharged and that the child shall be proceeded against as incorrigible, contemplates that the parent shall first be proceeded against if a child within his care and custody does not comply with the law relating to compulsory school attendance.
3. A boy twelve years old who during the school year was absent fifty-seven and one-half days, usually on Friday, with his father's consent, for the purpose of working to earn money with which to buy clothes, was not "habitually truant" within the meaning of sec. 48.01, relative to delinquent children.
4. "Habitual truancy" amounting to delinquency under sec. 48.01 is a refusal to attend school in defiance of parental authority; and a child can only be held a truant when the parent is unable to compel compliance by the child with the provisions of the compulsory school attendance law.
5. Under the statutes relative to compulsory school attendance, a parent no longer has the right to decide whether his child shall attend school or work, the law determining that for him.
6. A child should not be deprived of a home or a parent of the right to the child's custody and care under the juvenile laws except in cases where the best interests of the child clearly warrant such step; and any doubt should be resolved in favor of the home though it be imperfect and though its standards be not of the highest.

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7. Secs. 48.01 to 48.34, relative to delinquent children, do not provide a method of punishment for crimes committed by juveniles, but of improving the child's condition, and cannot be construed and applied as a punitive statute.
8. A child cannot be committed to an industrial school as a delinquent child on the ground that his home is not a fit and proper place for him where the father, though earning low wages, has done the best he could and the home is as good as thousands of other homes existing under like circumstances.
9. Where a boy twelve years old attempted to frighten his schoolmates and their teacher by exploding dynamite caps and fuse, but without expecting or anticipating that another boy would pick up a lighted fuse and be injured thereby, he cannot be committed to the industrial school for boys as a delinquent.

APPEAL from an order of the county court of Price county: ASA K. OWEN, Judge. *Reversed.*

It appears from the petition of Gus Krakau that Arnold Alley was a child at the time of the trial twelve years of age, residing at Phillips, Price county, Wisconsin; that on the 26th day of May, 1920, said Arnold Alley came into the possession of some dynamite caps and fuses; that he attached the fuse to one cap and threw it in such a manner that it was picked up by Rudolph Krakau, son of the complainant, and while in his hand exploded, severely injuring the child's hand. The petition further alleged that Arnold Alley was a delinquent child, and, upon information and belief, that he was incorrigible, growing up in idleness and crime, and that he fails and neglects to attend school, although of school age and physically able to do so; that he is habitually truant and insubordinate in and out of school. There was a trial. The court found that Arnold Alley was born on the 15th day of July, 1908; that he is a resident of Phillips; that he has been during the school year just closed habitually truant; that he was incorrigible and delinquent, and that a due regard for the morals and welfare of said Arnold Alley requires that he be committed to the Wisconsin industrial school for boys. From the order *David Alley*, father of Arnold, appeals.

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The cause was submitted for the appellant on the briefs of *Barry & Barry* of Phillips, and for the *State* on the brief of the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *C. E. Lovett,* district attorney of Price county.

ROSENBERRY, J. It is contended by the appellant that the evidence does not sustain the findings and that the court was therefore in error in ordering the child committed to the Wisconsin industrial school for boys. In our consideration of this matter we are, of course, limited to the matters appearing of record. From the record the following facts appear, stating them most favorably for the state: Arnold was absent during the school year fifty-seven and one-half days, it not appearing whether the absences were excused or unexcused. His class standings were poor, the grades running, beginning with the highest, A, B, C, D, and E. He received two Cs and six Ds. It appeared that the absences were usually upon Friday and were with the consent of the father, and that he was permitted to be absent for the purpose of working in order to earn money with which to buy himself clothes. There was a school picnic to which Arnold was not invited. Against the protest of the teacher he accompanied the children. While on the way to the picnic grounds some of the boys left the party to get a drink of water. Arnold joined this party and had in his possession some dynamite caps and some fuse. He attached a fuse to one cap and exploded it, as he says, for the purpose of frightening the party. A fuse was attached to a second cap, lighted, and then thrown out, and was picked up by the son of the complainant. It exploded in his hand, producing serious injuries. Arnold's mother died in 1914, leaving him and five other children. Arnold's grandfather is also a member of the family. After the death of the mother the family was cared for by the daughters. The father is a common laborer and at the time of the mother's death was receiving $1.50

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a day, which was just sufficient to enable him to provide for his family. It appears that the boy minds his father and the father offered to see, if the boy was put on probation, that he attended school. It further appeared that the father punished the boy for swearing and for skipping school. There is no evidence that he was guilty of any other form of delinquency. It appeared upon cross-examination that Arnold thought if he frightened the picnic party away he would be able to steal their lunch. It appeared also that he has at times stayed around the railroad tracks, climbing on cars, but after the injury of another boy had quit that practice. It appears that the complaint was prompted by the conduct of Arnold which resulted in the injuries sustained by the Krakau child.

While it is said in *Jensen v. Jensen,* 168 Wis. 502, 170 N. W. 735, that the paramount right of the father to the custody of his children has become the merest *prima facie* right, which yields readily when it is shown not to be for the best interests of the child, that language must be understood in connection with the facts in that case. There was a contest between the father and the mother as to the custody of an infant girl Dorothy, four and one-half years of age. The question here involved and in most cases of child delinquency is whether or not the interest of the child will be promoted by taking the child out of the family and placing it in a public institution, which is a question fundamentally different from that involved in the *Jensen Case.* Sec. 3964, Stats., declares:

"The father of the minor, if living, and in case of his death the mother, being themselves respectively competent to transact their own business and not otherwise unsuitable, shall be entitled to the custody of the person and estate of the minor, and to the care of his education."

This statute has not been repealed and the rights preserved to the father and mother under that section still remain, and they are substantial rights.

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When the court finds any child to be delinquent under sec. 48.08, Stats., it may by order place the child on probation or cause the child to be placed in a suitable family home or institution, subject to the friendly supervision of the probation officer, or commit the child to an industrial school for boys and girls respectively. By sub. (b), sec. 48.01, a delinquent child includes any boy under the age of seventeen years who violates any law of this state the penalty for which is not imprisonment in the state prison, or who is incorrigible, or who is growing up in idleness or crime, or who loafs or congregates with groups or gangs of other boys about any railroad yard or tracks, or who habitually uses any vulgar or profane language, or who is habitually truant or habitually insubordinate in any school.

In this case the court found that Arnold was habitually truant and incorrigible and upon that finding holds that he is delinquent within the meaning of sec. 48.01, and by the judgment of the court the father is deprived of the care and custody of his child, the child is taken out of the family and sent to a public institution. Sec. 40.73, which defines compulsory school attendance, contains the following provision:

"Any person who shall be proceeded against under the provisions of this subsection may prove in defense that he is unable to compel the child under his control to attend school or to work, and he shall be thereupon discharged from liability, and such child shall be proceeded against as incorrigible, or otherwise, according to law, and in case of commitment, if the parents or person having control of such child desire it, such child shall be committed to a school or association controlled by persons of the same religious faith as such child, which is willing and able to receive and maintain it without compensation from the public treasury."

The law contemplates that the parent shall first be proceeded against if for any reason a child within his care and custody does not comply with the law relating to compulsory school attendance. There is no evidence in this case that the truant officer, the school authorities, or any one else had

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called the attention of the father of Arnold to the fact that he was not attending school, and the evidence does show that when he was absent he was at work, at least a part of the time. The statute does not define the words "habitually truant." We think the evidence comes far short in this case of establishing the sort of "habitual truancy" upon which a finding of delinquency may be based. It must be borne in mind that the habitual truancy which amounts to delinquency is a refusal to attend school in defiance of parental authority. It is the intention and purpose of the statute that the child shall not be held a truant except in cases where the parent is unable to compel compliance by his child with the provisions of the compulsory school attendance law. The child Arnold in this case, if he can properly be said to be a truant at all, which is very doubtful in view of the fact that his absence was consented to by his father, was certainly far from being habitually truant within the meaning of sec. 48.01.

It may well be that there are parents in the state of Wisconsin who do not fully understand the purpose and objects of our recent legislation in regard to the education, protection, and reformation of children and that such legislation imposes upon parents a positive duty and a much higher obligation than that under which many parents suppose themselves to labor. The parent no longer has the right to decide whether his child shall attend school or work; the law determines that for him.

It is not the intent and purpose of the statute to visit upon the child a penalty for the neglect of his parent. Unless our juvenile laws are sympathetically and understandingly administered, they are likely to result in more harm than good. Properly administered they may become instruments of great value to the state. They certainly should not be administered as a criminal statute. It is the intent and purpose of the law to supplement the home in cases where it is needful. A result should not be arrived at which deprives a child of a home, or a parent of the right to the custody

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and care of the child, except in cases where the best interests of the child clearly warrant such a step. Doubt should be resolved in favor of the home even though it be imperfect and even though its standards be not of the highest. Its imperfections must be striking and its standards low indeed if the child would be benefited by being committed to the care of a public institution where it will be deprived not only of freedom, the love of friends and relatives, but will be branded with a stigma which years of subsequent good conduct may partially erase but never entirely remove.

It is argued on behalf of the state that the child Arnold is guilty of an offense. The findings made by the court are as previously stated. In the recitals of the order committing the child to the Wisconsin industrial school for boys there is an attempt on the part of the court to amplify the findings. If such recitals be treated as findings, we are of the opinion that the evidence is wholly insufficient to sustain the finding that the child Arnold "was guilty of wilfully and recklessly lighting and throwing near small children on a school picnic two fuses with dynamite caps attached, which caps exploded, and one of which, being picked up by a small child, caused severe mutilation of one of his hands;" that "he stole the caps and fuse and threw such fuse and caps with the intention of scaring away the teacher and children on the picnic so that he and other boys with him could steal the lunch." The evidence in this case establishes no more than that the child Arnold, in the endeavor to carry out a boyish prank, having found the caps and fuse in question near a stump apparently abandoned, attempted to frighten the teacher and children by exploding them. Neither do we think that the recital that Arnold is without proper parental control and that he is incorrigible and delinquent can be sustained. The trial court seems to have misconceived the object and purposes of the provisions of ch. 48, Stats. This law was not designed as a method of punishment for crimes committed by juveniles. Every section and paragraph of the statute is permeated with the benevolent purpose of improving the

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child's condition and not with punishing his past conduct. The whole object and purpose of this law will be defeated if it is construed and applied as a punitive statute.

We can find no evidence which sustains the recital that Arnold's home is not a fit and proper place for him. It appears that the father, although earning low wages, having the care of an aged father as well as his children, has been able to provide a home which is now paid for, and, so far as the evidence shows anything, it shows that the father is a hard-working, industrious, frugal, thrifty man. While the children have suffered an irreparable loss in the death of their mother, there is nothing in the case which warrants the finding that the home is not as good as thousands of other homes which exist under like circumstances. We find nothing in the record which suggests on the part of the father any lack of interest in his children, or lack of affection for them, or lack of desire to do for them all that his circumstances permit. He has, no doubt, done the best he could, and he ought not to be penalized for his failure to do more. The accident to the child of the complaining witness was most unfortunate. Dangerous situations and instruments have a well known fascination for children. There is nothing to indicate that Arnold intended to do more than frighten his schoolmates and their teacher or that he expected or anticipated that the Krakau boy would pick up this lighted fuse. The circumstances are most regrettable, but neither the interests of the child nor those of society at large will be advanced by the infliction of such a penalty as the judgment of the court prescribes in this case.

By the Court.—The order and judgment of the county court of Price county, sitting as a juvenile court, is reversed, and the clerk of this court is directed to forthwith remit the record in this case to the county court of Price county, and the Wisconsin industrial school for boys is directed to forthwith surrender the custody of the child Arnold to his father, the appellant here.

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SOUTH SIDE MALLEABLE CASTING COMPANY, Respondent, vs. FOUR WHEEL DRIVE AUTO COMPANY, Appellant.

February 9—May 3, 1921.

Appeal and error: Equal division of court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the order appealed from will be affirmed.

APPEAL from an order of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This action is brought by plaintiff to recover the alleged contract price for castings furnished by plaintiff to defendant between January 28 and March 23, 1918. These castings were delivered by plaintiff to defendant. Defendant refused to pay for them on the ground that the castings contained cracks and blow-holes and were otherwise defective and unfit for the purposes for which they were intended. Plaintiff claims that a certain change was made in the pattern for the castings by defendant on January 26, 1918; that this change was made by an agent of the defendant; that this change in the equipment was the cause of the defects of which defendant complains.

The case was tried before the court and a jury. By a special verdict the jury found that the defects in the castings were not caused by the change in pattern ordered by defendant's agent; that plaintiff's agent, who was informed of this change, had the authority to accept the change in equipment ordered by defendant's agent; that the plaintiff, in the exercise of ordinary care, should have discovered that the castings were cracked after the change made in the pattern equipment, and that the plaintiff should have discovered that the castings were cracked after 300 had been cast.

The court filed a decision holding that the jury's answer

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to the effect that the defects were not caused by the change in the pattern equipment was contrary to the preponderance of the evidence and that the production of 300 was too small a number of castings to enable plaintiff, in the exercise of ordinary care, to have discovered the defects in the castings. A new trial was granted. Defendant applied to the court to reconsider its decision, alleging that not only was there ample evidence to sustain the answers to the questions above mentioned, but that in any event it was entitled to judgment on the answers of the special verdict which had been allowed to stand. The court filed a second decision reaffirming the first decision, and ordered that the special verdict be set aside and a new trial had and that plaintiff pay the costs of the trial resulting in this verdict. This is an appeal from such order.

For the appellant there were briefs by *Otto L. Olen* and *Llewellyn Cole* of Clintonville and *Miller, Mack & Fairchild* of Milwaukee, and oral argument by *Mr. J. G. Hardgrove* of Milwaukee and *Mr. Cole.*

Edgar L. Wood of Milwaukee and *P. H. Martin* of Green Bay, for the respondent.

The following opinion was filed March 8, 1921:

SIEBECKER, C. J. Mr. Justice ROSENBERRY, Mr. Justice ESCHWEILER, and Mr. Justice OWEN are of the opinion that the order granting a new trial should be reversed. Mr. Justice VINJE, Mr. Justice JONES, and the writer are of the opinion that it should be affirmed. This, under the rule, requires an affirmance of the order. *Johnston v. West Allis,* 173 Wis. 463, 180 N. W. 121.

By the Court.—The order appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on May 3, 1921.

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KAHN, Appellant, vs. MALANEY, Respondent.

February 10—May 3, 1921.

Appeal and error: Equal division of court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Affirmed.*

Action to recover the balance claimed to be due upon the purchase price of one fur coat sold by plaintiff to defendant. The defense was that the coat delivered was not such a coat as had been contracted for. Trial before the court and jury resulted in judgment for the defendant dismissing the complaint. From this judgment plaintiff appeals.

R. F. Duckert of Madison, for the appellant.

For the respondent the cause was submitted on the brief of *Elmore T. Elver* of Madison.

The following opinion was filed March 8, 1921:

JONES, J. The court is equally divided in opinion upon the question involved on this appeal. Mr. Justice VINJE, Mr. Justice ROSENBERRY, and Mr. Justice ESCHWEILER are of the opinion that the judgment appealed from should be reversed. Mr. Chief Justice SIEBECKER, Mr. Justice OWEN, and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from must be affirmed. *Application of Gruhl Sash & Door Co.* 173 Wis. 215, 180 N. W. 845.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on May 3, 1921.

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HESS, Plaintiff in error, vs. THE STATE, Defendant in error.

February 11—May 3, 1921.

Information: Variance: Amendment changing date of offense charged.

On preliminary examination defendant was charged with having committed adultery on August 24, 1918, and this date was stated in the information. Prior to the commencement of the trial on March 24, 1920, with the consent of the court, an amended information charging the commission of the crime on August 31, 1918, was filed. *Held,* that the defendant was not prejudiced and cannot complain on the theory that he was never given any preliminary hearing as to the act of August 31, 1918, as only a single act was relied on, and the court, under sec. 4703, Stats., could have permitted evidence as to the act of August 31st under the original information.

ERROR to review a judgment of the county court of Trempealeau county: E. F. HENSEL, Judge. *Affirmed.*

May 26, 1919, upon complaint in writing before a justice of the peace for said county, the plaintiff in error, hereinafter designated as the defendant, was charged with having on August 24, 1918, in said county had unlawful sexual intercourse with one H. Upon preliminary examination he was bound over for trial. December 10, 1919, an information was filed charging the crime of adultery with said H. on said August 24, 1918. The case was subsequently sent to the county court. Just prior to the commencement of the trial on March 24, 1920, and upon consent of the court, an amended information was filed similar to the original, except only that the date upon which the offense was alleged to have been committed was changed from August 24th to August 31st. Before the amendment was allowed the district attorney was required by the court to file an affidavit to the effect that the transaction originally alleged to have taken place on August 24th was the identical act which the state expected to prove took place on August 31st. The

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defendant then moved to quash the information, and, the motion being denied, the defendant filed a plea in abatement and thereupon prayed that the action be dismissed and he be released from custody upon the ground that there had been no preliminary examination for the crime as charged in the amended information, he not having waived any such. The record and evidence taken before the justice of the peace on the preliminary hearing was received in evidence on defendant's offer in behalf of his plea in abatement.

In the testimony of the complaining witness, one George Suchla, taken on such preliminary, he fixed August 24th as the date of the transaction relied upon to sustain the charge. He was quite positive as to the date and fixed the same by reference to a certain trip that the defendant and his wife had made to the neighboring village. His attention was called on cross-examination to the giving to him of a certain check for his wages by defendant. The circumstances in connection with such check and its date and time of payment would have indicated that the transaction testified to by such complaining witness could not have been on August 24th.

The plea in abatement was quashed and the defendant excepted. Upon his plea of not guilty the trial was had and the jury found him guilty of the offense as charged.

The defendant at the close of the testimony for the state moved that the action be dismissed, and after verdict moved to set aside the same and for a new trial.

From the judgment of conviction the defendant sued out this writ of error.

For the plaintiff in error there was a brief by *Gilman & Broadfoot* of Mondovi, *John A. Markham* of Independence, and *Cowie & Hale* of La Crosse; and the cause was argued orally by *Quincy H. Hale* and *R. S. Cowie.*

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney

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general, and *Ole J. Eggum,* district attorney of Trempealeau county; and the cause was argued orally by *Mr. Eggum* and *Mr. Messerschmidt.*

The following opinion was filed March 8, 1921:

ESCHWEILER, J. By sec. 4576, Stats., providing a penalty for the crime of adultery, it is also provided that no prosecution shall be had unless commenced within one year from the date of the alleged offense.

Defendant contends that the amendment to the information whereby the commission of the alleged offense was charged to be on August 31st instead of August 24, 1918, in effect amounts to charging him with the commission of a separate and distinct offense than that upon which he had been originally brought into court. That as to the alleged offense of August 31st he had had no preliminary examination, and that such offense not being charged until the time of the trial in March, 1920, and when more than one year had elapsed since such date, the prosecution therefore was barred by the one-year limitation in sec. 4576, Stats. He also contends that such change of date could not be considered as a permissible amendment to the original complaint or information thereupon and not within the intent or meaning of sec. 4703, which reads as follows:

"*Variance disregarded, when.* Section 4703. Any court of record in which the trial of an indictment or information is had may forthwith allow amendment in case of variance between the statement in the indictment or information and the proof in the following cases: In the name or description of any person, place or premises, or of any thing, writing or record, or the ownership of any property described in the indictment or information and in all cases where the variance between the indictment or information and the proof are not material to the merits of the case."

Sec. 4704 gives the court which has permitted an amendment under the preceding section discretionary power to

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postpone the trial on account of any such amendment. In this case, however, no application for such postponement was made by the defendant and no showing or claim made here that his rights were in anywise prejudiced by the trial being then had.

It being clear at all stages of the proceeding that but one specific act was relied upon to support the charge against the defendant, we cannot deem the permitted change to be in a matter so material to the merits of the case as to make it beyond the statutory authority given to the court under sec. 4703, *supra.*

It is true that in an information for such an offense a time should be specifically alleged as that on which such offense was committed. Yet unless some material right of the defendant is affected, as for example when such change might bring the alleged offense within some period of statutory limitation, the prosecution is not formally tied to any such date and may prove the commission of the offense charged on some other day within a reasonable limitation. *Comm. v. Gardner,* 7 Gray (73 Mass.) 494.

If, therefore, evidence on the trial might have been properly received as to the changed date upon the original information, it is quite manifest that no prejudice could result in the defendant being thus formally notified before the commencement of the trial of such proposed change.

The situation here presented is similar to that in *Robinson v. State,* 143 Wis. 205, 208, 126 N. W. 750; *Schultz v. State,* 135 Wis. 644, 652, 114 N. W. 505, 116 N. W. 259, 571, and cases there cited; and these cases rule this. See, also, 7 A. L. R., note on p. 1531.

There being no attempt to prove or rely upon more than one distinct offense, such cases as *Boldt v. State,* 72 Wis. 7, 38 N. W. 177, and *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185, where, upon informations charging one specific offense upon one specific date, evidence was held to have

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been improperly received as to similar offenses on different dates, are not in point.

We have examined the assignments of error based upon alleged errors in rulings upon the evidence. We find none that merit any detailed discussion and can find no prejudicial error in the trial.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on May 3, 1921.

FARMERS STATE BANK OF WAUPACA, Appellant, vs. HANSEN, Respondent.

February 8—May 3, 1921.

Guaranty: Release of liability by fraud of creditor: Failure to give notice of nonpayment: Collusion between creditor and guarantee: What constitutes fraud sufficient to discharge guarantor.

1. Sec. 1679—1, Stats., specifying the conditions under which a person secondarily liable on a negotiable instrument may be discharged, does not specify all the instances or contingencies that may arise to release a guarantor; but action on the part of a creditor after a note is due which amounts to a fraud on the guarantor, misleading him and depriving him of an opportunity of recoupment and protection, may discharge the guarantor.
2. Conduct such as will release a guarantor cannot arise from mere passivity on the part of a creditor, but must consist of some affirmative act or connivance or gross negligence amounting to a fraud.
3. The payee of a note is not required to notify the guarantor of the maker's nonpayment.
4. A guarantor who expressly waived notice of nonpayment of a note was not discharged by the failure of the payee to notify him of nonpayment, regardless of the reasons which prompted the payee not to give such notice.
5. If the cashier of a bank, which was the payee of a note, and the maker agreed that the fact of nonpayment should be mis-

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represented to the guarantor, and pursuant to such agreement the maker informed the guarantor that the note was paid, and the guarantor thereby lost an opportunity of recoupment, he would be released from liability; but it is *held* that the evidence does not support such a finding.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Reversed.*

This action was brought to enforce the liability of the defendant as guarantor of a note executed by one Nelson to the plaintiff bank under date of June 15, 1917, for $1,000, due July 15, 1917. The guaranty appears on the back of the note in the following words:

"For value received, I hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of six per cent. per annum, until paid, waiving demand, notice of nonpayment, and protest.

"(Signed) A. M. HANSEN."

The maker of the note defaulted in making payment. Although it was customary for the bank to send notice to guarantors about ten days after default, it failed to send such customary notice to the defendant *Hansen* until about December 10, 1917. When the note became due Nelson went to the bank and paid the interest. The matter of the payment of the principal was talked over. Nelson told the cashier that he could pay $600 on the note in a few days, and that he could get *Hansen* to sign a renewal note for the balance of $400. Nelson and the cashier concurred in the opinion that *Hansen* might refuse to sign a renewal note for $1,000 and that it would be better to wait until Nelson could pay the $600 and then ask *Hansen* to sign a renewal note for $400. It seemed to have been realized by both Nelson and the cashier that if *Hansen* knew the note was not paid he might "get stirred up and investigate and take some action." About this time Nelson told *Hansen* that the note at the bank had been paid. The matter ran along. Nelson failed

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to pay anything on the note and left the state, after which the bank notified *Hansen* of the condition of affairs and brought this action to recover the amount of the note from *Hansen.*

The action was tried before a jury, which returned the following special verdict: (1) that on or after the note in suit became due the cashier of the plaintiff bank had an understanding with Nelson that the fact of nonpayment by Nelson of the said note should not be disclosed to the defendant *Hansen,* and (2) that the defendant *Hansen* did not have any notification from the bank of the nonpayment of the note prior to December 10, 1917.

Judgment was rendered in favor of the defendant upon such special verdict, and from the judgment so entered the plaintiff bank brings this appeal.

For the appellant there was a brief by *John C. Hart* of Waupaca, attorney, and *William E. Fisher* of Stevens Point, of counsel, and a reply brief signed by *Fisher & Cashin* of Stevens Point; and the cause was argued orally by *William E. Fisher.*

For the respondent there was a brief by *Browne, Browne & Smith* of Waupaca, attorneys, and *B. R. Goggins* of Wisconsin Rapids, of counsel; and the cause was argued orally by *Mr. L. D. Smith* and *Mr. Goggins.*

OWEN, J. Sec. 1679—1, Stats., specifies the conditions, seven in number, under which a person secondarily liable upon a negotiable instrument may be discharged. It is conceded that the facts found by the jury do not fall within any of the conditions specified in that section. The appellant contends that such conditions are exclusive, and that unless the facts found by the jury fall within some one of those specifications they are not sufficient to operate as a discharge of the defendant. The trial court held "that any agreement by a payee with a maker primarily liable, after the note becomes due, or any other line of action on the part of the

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payee which amounts to a fraud on a guarantor, putting him in a materially less favorable position to save himself from loss, will release the guarantor," and that the facts found by the jury fell within the principle so stated. We are inclined to agree with the trial court that action on the part of a creditor after a note becomes due which amounts to a fraud on the guarantor of the note, which misleads him as to the fact of the nonpayment thereof and lulls him into the security that the note has been paid, and by reason thereof the guarantor is placed at a disadvantage and loses an opportunity to recoup and protect himself, may operate to discharge the guarantor, and that sec. 1679—1 does not specify all the instances or contingencies that may arise to release a guarantor. This conduct which will operate as a release of the guarantor, however, cannot arise from mere passivity on the part of the creditor, but it must consist of some affirmative act or connivance or gross negligence amounting to a fraud on the guarantor in order to work his discharge. *Hubbard v. Haley,* 96 Wis. 578, 589, 71 N. W. 1036; *Sentinel Co. v. Smith,* 150 Wis. 231, 136 N. W. 602.

The finding of the jury is that on or after the note in suit became due the cashier of the plaintiff bank had an understanding with Nelson that the fact of nonpayment by Nelson of the said note should not be disclosed to the defendant *Hansen.* The law does not impose upon the creditor any duty to notify the guarantor of the nonpayment of the note by the principal maker. *Hubbard v. Haley, supra; International Textbook Co. v. Mabbott,* 159 Wis. 423, 428, 150 N. W. 429. In the latter case, at page 428, it is said:

"In *Hubbard v. Haley,* 96 Wis. 578, 71 N. W. 1036, this court, in view of a conflict of authorities on the subject, adopted the rule that no notice of the default of an original promisor is required to be given a guarantor of absolute payment or performance to render him liable on the guaranty."

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The guaranty in this case is one of absolute payment, hence it falls within the rule above quoted, and the bank was under no obligation to notify *Hansen* of Nelson's default.

True, it was the custom of the bank to notify guarantors about ten days after nonpayment by the principal obligor of such default, but it is not claimed in this case that *Hansen* knew of such custom or relied thereon, or that the contract of guaranty was entered into under such circumstances as to make that custom a part of the contract. On the contrary, notice of nonpayment is expressly waived in and by the terms of the guaranty itself. So, upon the face of the jury's finding, we have a situation where the plaintiff bank is convicted of nonperformance of that which it was under no obligation to perform. It was under no legal obligation to notify *Hansen* of the fact of the nonpayment of the note. Certainly it would not discharge the guarantor by its failure to notify him of such nonpayment when no duty devolved upon it to give such notice. Nor can we perceive how an agreement with Nelson on the part of the bank to do that which it had a right to do, or, stated in another way, to refrain from doing that which it was not required to do, constituted conduct on its part amounting to such fraud as would release *Hansen*. It was under no obligation to notify *Hansen* of the nonpayment of the note, and *Hansen* cannot claim to be discharged from payment thereof by reason of any mere passive failure on the part of the bank to so notify him, no matter what the reasons were prompting the bank to that course of action.

But it is argued here that the finding of the jury should be construed as an agreement between the bank and Nelson to actively suppress the fact from *Hansen* that the note had not been paid. This is argued because after a conversation between Nelson and the cashier of the bank, which will hereinafter be referred to, Nelson told *Hansen* that the note was paid. While conceding that if the cashier and Nelson agreed that the fact of nonpayment should be misrepresented to

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Hansen and that he should thereby be lulled into security in the belief that the note had been paid and that Nelson, as the result of such agreement and pursuant to an understanding with or acquiescence on the part of the bank, falsified that fact to *Hansen,* and *Hansen* had thereby lost an opportunity to recoup himself, such conduct would amount to a fraud which would release the guarantor, we are of the opinion that the evidence fails to support any such finding.

Nelson's deposition, taken in behalf of the defendant, was read at the trial, and with reference to the subject under consideration he said:

"When that note became due in July, 1917, the bank sent me notice, and I went in and saw them and paid the interest. I talked with Mr. Skinner about the note; that I thought I would be able to do something on it in a short time. Mr. Skinner said to let the note run for a little while. At that time I gave him a new note for $1,000. I said, 'I will sell a couple of cars and figure on raising about $600 within the next month.' I told Skinner that I would want to pay this on that note before I asked *Mr. Hansen* to sign another note, because I knew that *Mr. Hansen* would not sign another note for $1,000, but might sign one for less. Mr. Skinner said no doubt that would be the best way; if I went and paid what I could, *Hansen* would no doubt help me a little more. I told *Mr. Hansen* I had been at the bank and I had seen Mr. Skinner about the note, and that it was fixed up satisfactorily, and would come out all right. After that I did not say anything to *Mr. Hansen* about that note. Mr. Skinner and I talked over what *Hansen* might do if he was asked to sign a new note for $1,000; if *Hansen* was asked to sign a new note for $1,000 he might investigate, and we finally agreed that it would be better to wait. We thought he might want the matter settled at once. Both Mr. Skinner and I were afraid he might take some action against me."

This is the testimony upon which a conspiracy or fraudulent purpose on the part of the bank must be sustained. This fails to establish the fact that Skinner, the cashier of the bank, agreed to actively suppress the facts from *Hansen,* or an agreement that Nelson should do so. It is true that

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Nelson did tell *Hansen* that the note had been paid, but the evidence completely fails to connect the bank with such misrepresentation. Nelson's evidence, above quoted, clearly indicates that he talked the matter over with the cashier and it was the judgment of both that it might be better to let the $1,000 note stand until Nelson could make a $600 payment, when *Hansen* would probably willingly sign a renewal note of $400 for the balance. There was no extension of the time of payment, there was no misrepresentation of the fact of nonpayment on the part of the bank, there is no evidence that the bank suggested that Nelson should misrepresent the fact; nothing except an understanding between Nelson and the cashier that the $1,000 note should be permitted to stand until he could make a part payment, at which time *Hansen* would probably consent to become a guarantor upon a note for the balance of $400. This, in our opinion, fails to establish such fraud on the part of the bank as to release the guarantor. In fact, it does not establish any fraud on the part of the bank. The bank in dealing with the note merely pursued a course of conduct which it was entirely lawful for it to pursue. The only thing the bank did was to fail to notify *Hansen* that the note remained unpaid. The law cast upon the guarantor the duty of ascertaining whether or not the note had been paid. He failed to make any inquiry at the bank. He seemingly accepted Nelson's word that it had been paid. While Nelson falsified in this particular, the evidence fails to connect the bank therewith and, as a consequence, the bank cannot be held responsible for Nelson's falsification or fraudulent conduct.

The evidence fails to establish any conduct on the part of the bank which amounts to a release of the guarantor, and judgment should have been rendered in its favor.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff for the amount due on the note.

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NEKOOSA-EDWARDS PAPER COMPANY, Appellant and Respondent, vs. NEWS PUBLISHING COMPANY, Appellant and Respondent: ALEXANDER, Appellant.

February 9—May 3, 1921.

Corporations: Monopolies: Examination of officers and agents: Privilege against self-incrimination: Character of privilege: Personal and not possessed by corporation: Limitation of actions: Production of books and records.

1. Secs. 1791*j* to 1791*m*, Stats. 1919—making unlawful any conspiracy on the part of any domestic corporation creating a monopoly or controlling prices, providing that the attorney general shall address inquiries to the officers of any corporation believed to have violated any provision of sec. 1791*j*, and declaring that no person shall be excused from answering any of such inquiries on the ground that the answer may tend to criminate him, but that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction or thing to which he may testify, except that the charter of the offending corporation may be forfeited,—apply only to proceedings by the state against a monopoly. Where a private person pleads as a counterclaim for damages in a civil action for the purchase price of goods that the plaintiff, a corporation, was guilty of creating and maintaining a monopoly, an officer of the corporation is entitled to claim his individual privilege from answering questions which may tend to criminate him.
2. The burden of proof rests on the party denying the privilege against self-incrimination to show affirmatively that the statutes of limitation have run and that no suits begun within the statutory period are pending.
3. A corporation is not a person within the meaning of amendm. V, Const. U. S., sec. 8, art. I, Const. Wis., or sec. 4077, Stats., providing that no person shall be compelled in any criminal case to be a witness against himself, the corporation being only an artificial entity created to carry on the legitimate business of the community; and when a corporation violates the law it violates the purpose of its creation, and is not as an individual entitled to the privilege against self-incrimination.
4. A corporation in an action by a private party entitled to damages because of the violation of sec. 1747*e*, Stats., by the

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corporation, cannot lawfully refuse to allow its books and papers to be produced and inspected.

5. A corporation cannot, on the theory that its officers or agents might be incriminated by a disclosure of the corporate records, prevent inspection of corporate books, the immunity against self-incrimination being a personal one, covering the officers and agents alone; and the corporation, having no such immunity, cannot invoke it on behalf of its officers and agents.

APPEALS from orders of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed in part; reversed in part.*

Plaintiff, a corporation, brought an action against the defendant, a corporation, to recover the purchase price of print paper sold it. Defendant admitted plaintiff's cause of action but counterclaimed for damages, alleging upon information and belief that plaintiff was one of a number of paper manufacturing conspirators operating under the name of the "News Print Manufacturers Association" and engaged in creating and maintaining a monopoly in print paper and in creating and maintaining exorbitant prices therefor, contrary to the laws of the state and of the United States, and that by reason of such unlawful monopoly defendant was compelled to purchase its print paper from plaintiff at exorbitant prices to its damage.

The reply put in issue the material allegations of the counterclaim. Defendant then sought to examine *L. M. Alexander,* plaintiff's president, and other of its officers and servants, under sec. 4096, Stats., as to said unlawful monopoly and to have him produce all books, papers, etc., showing or tending to show the true cost of print paper and all evidence or data tending to show plaintiff's membership in the "News Print Manufacturers Association," the organization thereof, and the conduct of its business.

Plaintiff moved for an order perpetually enjoining the defendant from examining the said witness or any of its officers or servants in regard to said alleged monopoly and

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from the production of its books, papers, etc., as called for. The court by an order dated May 19, 1920, denied plaintiff's motion so far as it related to the examination of the witnesses and the production of its books and papers showing the actual cost of print paper, but granted it so far as it required it to produce evidence or data with reference to its alleged membership in the News Print Manufacturers Association.

The examination of *Mr. Alexander* followed, and he refused to answer certain questions as to the cost of print paper on the ground that his answer might tend to incriminate him, and because it might tend to subject him to a penalty, claiming his privilege under the constitution and laws of this state and of the United States. For like reasons he refused to produce certain books and papers, etc. The same privilege was duly claimed by counsel for plaintiff in its behalf.

Questions relating to plaintiff's connection with the News Print Manufacturers Association the witness was not required to answer. The commissioner ruled "that a corporation is not a person within the meaning of the constitution of the United States or the constitution of the state of Wisconsin in this behalf in any way under any circumstances." The result was that *Mr. Alexander* was by the commissioner ordered to be in contempt of court and to be committed to the county jail till he purged himself. This ruling was affirmed by an order of the court dated May 28, 1920. The commissioner's ruling that plaintiff need not produce evidence or data with reference to its connection with the News Print Manufacturers Association was by said order of May 28th likewise affirmed.

The plaintiff appealed from so much of the order of May 19th and the subsequent orders requiring the witness *Alexander* to be examined as to the cost of print paper and adjudging him in contempt for refusal to answer and holding that a corporation is not a person within the meaning of

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the immunity grants in our state and federal constitutions. The defendant appealed from so much of the order of May 19th and subsequent orders as relieved plaintiff from disclosing its connection with the News Print Manufacturers Association.

For the *Nekoosa-Edwards Paper Company* and *L. M. Alexander* there were briefs by *Goggins, Brazeau & Goggins* of Wisconsin Rapids, and oral argument by *B. R. Goggins.*

Thomas H. Gill of Milwaukee, for the *News Publishing Company.*

VINJE, J. A consideration and decision of the questions presented by plaintiff's appeal will also dispose of the question raised by the defendant's appeal.

Plaintiff claims (a) that sec. 4, ch. 357, Laws 1897, now sec. 1791*m*, Stats. 1919, granting immunity in certain cases, does not relate to or include private suits between private parties, but relates exclusively to prosecutions by the state to suppress unlawful monopoly; (b) that since it does not affirmatively appear that the statutes of limitation have run on the alleged offenses and that suits therefor are not now pending, no disclosures can be compelled; and (c) that a corporation has the same constitutional and statutory immunity from self-incrimination that a person has. A determination of the soundness of these claims will dispose of all questions necessarily involved in the appeals.

Ch. 357 of the Laws of 1897 was entitled "An act to prevent corporations organized under the laws of this state from entering into any combination, conspiracy, trust, agreement or contract, intended to operate in restraint of any lawful trade or commerce carried on in this state." It contains but four sections besides the one providing when it shall take effect. These sections with some amendments now appears as secs. 1791*j*, 1791*k*, 1791*l*, and 1791*m* of the Statutes of 1919 under the title Trusts, Pools, and Con-

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spiracies. The first section declares unlawful any conspiracy on the part of a domestic corporation creating a monopoly or controlling prices and provides for a forfeiture of its charter upon proof thereof. The second section makes it the duty of the attorney general upon notice, or when he has reason to believe that any corporation has violated any of the provisions of sec. 1 (sec. 1791*j*, Stats.), "forthwith to address to any such corporation or to any director or officer thereof such inquiries as he may deem necessary for the purpose of determining whether or not such corporation has violated any provision of said section." It requires that the corporation make prompt answer to such inquiries, and that upon a failure to do so within sixty days, unless time is extended by the attorney general, it becomes his duty to proceed against the corporation as provided for in the next section, which requires him to bring an action to annul the franchise of the corporation. Then follows the immunity section (sec. 1791*m*, Stats.), which reads:

"No person shall be excused from answering any of the inquiries herein provided for, nor from attending and testifying, nor from producing any books, papers, contracts, agreements or documents in obedience to a subpœna issued by any lawful authority in any case or proceeding based upon or growing out of any alleged violation of any of the provisions of section 1791*j*, or of any law of this state in regard to trusts, monopolies or illegal combinations on the ground of or for the reason that the answer, testimony, evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may answer, testify or produce evidence, documentary or otherwise, in obedience to any request under these provisions or any subpœna, or either of them, in any case or proceeding, except that the charter of any corporation may be vacated and its corporate existence annulled as hereinbefore provided, and except further, that no person testifying in any case or proceeding aforesaid

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shall be exempt from punishment for perjury committed in so testifying."

It is quite apparent that the whole scheme of the chapter and the section of the statutes as amended concerns prosecutions by the state for a violation of sec. 1791*j* or of any other law of the state relative to trusts. All the sections were enacted in one act and relate to state control over trusts. The words of sec. 1791*m* that "No person shall be excused from answering any of the inquiries herein provided for," clearly refer to inquiries propounded by the attorney general as required by sec. 1791*k*. And the words in the latter part of sec. 1791*m*, "except that the charter of any corporation may be vacated and its corporate existence annulled as hereinbefore provided," also show that a state proceeding is contemplated. In addition to the reasonably clear import of the sections gathered from their language, there is the further reason that the immunity granted by sec. 1791*m* should be permitted only at the option of the state. To allow it to be invoked in private suits involving perhaps only a small sum in damages or in penalties would result in granting immunity baths to corporations at the instance of private parties, perhaps friendly parties, and thus prevent the state from proceeding against them for violations of trust laws.

Not only the language of the sections and the reasons above suggested lead to the conclusion that the immunity relates only to state proceedings, but decided cases in other jurisdictions strengthen it, for the reason that in all cases called to our attention where the privilege has been denied it has been in cases where the sovereign has exercised its visitorial powers or in cases for the enforcement of penalties where the state has expressly granted immunity. That the offense charged in the counterclaim is one that comes within the constitutional privilege there can be no doubt: *Karel v. Conlan,* 155 Wis. 221, 232, 144 N. W. 266.

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It appears from the counterclaim that February 15, 1917, is the date of plaintiff's last transaction with the defendant, and it claims that the statutes of limitation have run on the alleged offense and therefore plaintiff is not entitled to its privilege. The difficulty with the claim is that the record is silent as to whether or not suits have been begun within the statutory period and are still pending. The burden of proof rests upon the party denying the privilege to show affirmatively that the statutes have run and that no suits begun within the statutory period are pending. *Lamson v. Boyden,* 160 Ill. 613, 43 N. E. 781; *Southern R. N. Co. v. Russell,* 91 Ga. 808, 18 S. E. 40; *Bank of Salina v. Henry,* 2 Denio, 155, 160; *Henry v. Bank of Salina,* 1 N. Y. 83, 87. The latter defendant has failed to do, hence it is not necessary to determine what statutes of limitation apply or whether the offense is such a continuing one, as plaintiff claims it to be, that no statute has yet run.

The court therefore erred in holding that the witness *Alexander* could not claim his constitutional privilege and that he was in contempt of court for failure to answer the questions propounded to him.

It remains to consider and determine the question whether a corporation is a "person" within the immunity privilege of the constitution of the United States, or of this state, or statutes thereunder.

The Fifth amendment to the United States constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." Sec. 8, art. I, of our constitution is identical in language, and sec. 4077, Stats. 1919, providing that a witness cannot refuse to answer on the ground that it may subject him to a civil liability, says: "But this provision shall not be construed to require a witness to give any answer which shall have a tendency to accuse himself of any crime or misdemeanor or to expose him to any penalty or forfeiture."

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Since a corporation is created for legitimate business purposes, it follows that in the exercise of that purpose it should have all the constitutional prerogatives incident thereto. Thus it has been held to be within the due process of law clause of the Fourteenth amendment to the federal constitution. *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Northwestern M. L. Ins. Co. v. State,* 163 Wis. 484, 155 N. W. 609, 158 N. W. 328; *Covington & L. T. R. Co. v. Sandford,* 164 U. S. 578, 17 Sup. Ct. 198; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418. It has also been held to be within the equal protection of the law clause of the same amendment. See cases above cited. It has been held to be within the provision against double jeopardy. *Shevlin-Carpenter Co. v. Minnesota,* 218 U. S. 57, 30 Sup. Ct. 663. The provision of art. I, sec. 13, of our constitution, that "the property of no person shall be taken for public use without just compensation," includes that of a corporation. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851. So a corporation has been held to be a citizen (*Norwich P. Co. v. Abaly,* 133 Wis. 530, 113 N. W. 963) and a resident (*Shaw v. Quincy M. Co.* 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; 14 Corp. Jur. 66). And sub. (12), sec. 4971, Stats. 1919, provides that "the word 'person' may extend and be applied to bodies politic and corporate as well as to individuals."

The illustrations given relate to the legal status of a corporation respecting its property rights in the lawful exercise of its functions or as to being required twice to answer the same criminal charge. In such cases persons and individuals stand upon an equal footing. But as will be pointed out hereafter, when it comes to self-incrimination the reasons that give rise to personal immunity do not apply, at least not in the same degree, to corporations. The revolt from the torture chamber and the horrors of the Spanish Inquisition led to the more humane rule that no person should

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be compelled to incriminate himself. It was a radical reaction from abuses that now reappear in a milder form in the so-called "third degree" examination which has no place in our criminal jurisprudence. It is clear, therefore, that the word "person" includes a corporation where a corporation is within the purpose of the provision, constitutional or statutory, and the reasons for including it are the same, or substantially so, as those that relate to a person.

But it will not be held to be included where it is not within the purpose and intent of the provision. 14 Corp. Jur. 67. Is a corporation within the intent and purpose of the Fifth federal amendment? In *McCulloch v. Maryland,* 4 Wheat. 317, 411, we find this significant language of Chief Justice MARSHALL: "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else." What is that something else? Obviously it is the transaction of lawful business. And it is equally obvious that the corporation is thus created for the primary benefit of the state and not for that of the corporation itself. The state creates this corporate entity because the business needs of the public, the state, are thereby promoted. The moment a corporation becomes an injury to the public it has no valid reason for existence, because the object for which it was created has not only been thwarted but the creature has become an instrument of evil. It is otherwise with a natural person. He is created for his own existence, and not for a mere business purpose. He has certain inalienable rights such as "life, liberty, and the pursuit of happiness." He may transgress the law and yet his right of being remains inviolate except in cases of capital punishment. He is a natural entity enjoying the faculties, rights, and privileges with which he is endowed, and the basic law says he shall not be compelled to make declarations that will forfeit them, because he is not a mere instrument for a specific business purpose. He has his hopes, his aspirations, his desires, and

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his weaknesses—he *lives;*—a corporation merely exists, and that in an artificial way for a single purpose. Paraphrasing Shakespeare it can be said, "Hath not a guilty man eyes? Hath not a guilty man hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as an innocent man is?" Having, then, these sensibilities and faculties which constitute the essence of a natural person, there is an underlying reason for not requiring self-incrimination from him which does not exist in the case of a corporation. There is no "personal" death or loss of liberty in the annulment of a corporate franchise or in a judgment for damages against it. When, therefore, it undertakes to do that which the law forbids and which injures the public, it has no claim for mercy that needs be recognized.

Hence if a corporation has made a record by its books or papers that shows it has violated the purposes for which it was created, why should not the state which gave it birth for legitimate business purposes only have the right, either directly in the exercise of its inquisitorial powers or indirectly through one damaged by such unlawful conduct of the corporation, to inspect the record thus made?

It has been generally held that at the suit of the state a corporation is not immune from self-incrimination because it is not a "person" within the meaning of the Fifth amendment to the federal constitution. 8 Thompson, Corp. (2d ed.) § 3280; *Hale v. Henkel,* 201 U. S. 43, 26 Sup. Ct. 370; *Nelson v. U. S.* 201 U. S. 92, 26 Sup. Ct. 358; *Bornn H. Co. v. U. S.* 184 Fed. 506, affirmed 223 U. S. 713, 32 Sup. Ct. 521; *Hammond P. Co. v. Arkansas,* 212 U. S. 322, 348, 29 Sup. Ct. 370; *Wilson v. U. S.* 221 U. S. 361, 382, 31 Sup. Ct. 538; *Dreier v. U. S.* 221 U. S. 394, 31 Sup. Ct. 550; *Grant v. U. S.* 227 U. S. 74, 33 Sup. Ct. 190. See, also, *Horlick's M. M. Co. v. A. Spiegel Co.* 155 Wis. 201,

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213, 144 N. W. 272; *In re Moser,* 138 Mich. 302, 101 N. W. 588; *Consolidated R. Co. v. Vermont,* 207 U. S. 541, 28 Sup. Ct. 178.

Has the corporation immunity except in a direct action by the state? Sec. 1747*c,* Stats. 1919, provides:

"Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section."

It will thus be seen that, in addition to the penalties exacted by the state, it gives to any person doing business in this state the right to collect "all damages he may sustain by reason of the doing of anything forbidden by this section." The giving of such right implies the means of enforcing it. *McCulloch v. Maryland,* 4 Wheat. 317, 411. The conferring of a right without a remedy is but an empty gift. It cannot have been the legislative intent to deprive the person damaged by the transgressing corporation of practically the only means of proving his damage, namely, by an inspection of the books of the corporation, in order that the corporation might not only escape the lawfully prescribed penalty but also enable it to continue to violate the law. It is significant that sec. 1797*m,* providing for an immunity, excepts therefrom the annulment of the corporate charter. Such exception must be founded upon the ground that it is contrary to public policy to permit an offending corporation to continue to do business because of its likelihood of again transgressing the law and because a corporation that wilfully violates the law to the public hurt has no legal or moral right to exist. The penalty by way of dam-

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ages to the injured person is a statutory penalty granted and sanctioned by the state, and it is to its interest that it should be enforced because such enforcement tends to keep corporations within the law. We thus find that a private party in enforcing a statutory penalty given it can require the production and inspection of the corporate books and papers to prove the violation of the statute. *American L. Co. v. Werckmeister,* 221 U. S. 603, 31 Sup. Ct. 676. It would seem to follow logically that since a corporation is not within the constitutional immunity it cannot, at the suit of a private party entitled under the statute to collect damages from it, invoke as a shield that which it does not possess, namely, immunity from self-incrimination. So we reach the conclusion that a corporation at the suit of a private party entitled by the statute to damages cannot lawfully refuse to allow its books and papers to be produced and inspected.

It is well established by the cases cited to the main proposition that a corporation is not within the constitutional immunity granted by the Fifth amendment that the requiring the production of its books constitutes no violation of the Fourth amendment prohibiting unreasonable searches and seizures.

It has also been held that the fact that the compelled disclosure of the corporation may incriminate its officers or agents does not render it or them immune. 8 Thompson, Corp. (2d ed.) § 3280; *American L. Co. v. Werckmeister,* 221 U. S. 603, 31 Sup. Ct. 676; *Dreier v. U. S.* 221 U. S. 394, 31 Sup. Ct. 550; *Grant v. U. S.* 227 U. S. 74, 33 Sup. Ct. 190; *Wilson v. U. S.* 221 U. S. 361, 31 Sup. Ct. 538. In the latter case it is said:

"The appellant [an officer of the corporation] held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures." Page 384.

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A corporation can act only through its officers and agents, hence if their immunity protected the corporation it would need none of its own. Their immunity, however, is a personal one, which covers them alone and not the corporation. It must stand on the strength of its own constitutional rights or fall by reason of the lack of them, and its officers and agents must realize, when they confide to its keeping facts which disclose its unlawful conduct, that they thereby voluntarily disclose their own delinquencies. They must realize also that the state, both directly and indirectly, may rightfully inquire into the lawfulness of its business methods, and may either mulct it in damages or destroy it because of doing that which the law forbids. In granting a corporate franchise the state creates no Frankenstein monster, but a creature subservient to its best interests, whose wrongful conduct may be punished by the payment of damages or by corporate death at the election of its creator.

It follows that the court erred in not sustaining the objections to the questions propounded to the witness *Alexander* in his individual capacity, and in sustaining the objections to the production of the corporate books and papers showing plaintiff's connection with the News Print Manufacturers Association; and that it rightfully held the corporation was not within constitutional or statutory immunities.

By the Court.—Upon the plaintiff's appeal the orders requiring the witness *Alexander* to be examined in his individual capacity as to the cost of print paper are reversed. The order holding that a corporation is not a person within the meaning of the immunity grants of our state and federal constitutions is affirmed. Upon defendant's appeal the order excusing the production of corporate books and data to show plaintiff's connection with the News Print Manufacturers Association is reversed, without costs to either party. Plaintiff will pay the clerk's fees.

ESCHWEILER and DOERFLER, JJ., took no part.

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STATE EX REL. BINNER, Plaintiff, vs. BUER and others, Defendants.

February 12—May 3, 1921.

Elections: Nonpartisan elections in Milwaukee county: Constitutional law: Equality under the law: Legislature: Power to enact laws: Constitutional restraints: Uniform county government: Judges not county officers: Political parties: Right to party designation on ballot: Special legislation: Action to restrain enforcement of invalid law: Declaratory relief.

1. An action to restrain boards of election commissioners from enforcing and following the provisions of alleged unconstitutional statutes in the conduct of an election and future elections presents an existing controversy calling for judicial cognizance independent of sec. 2687*m*, Stats., authorizing the maintenance of equitable actions to obtain declaratory relief. (Questions relative to the constitutionality of sec. 2687*m* are not involved in this case.)
2. A voter is entitled to the same right of suffrage in the election of a public officer that is accorded to all other electors of the territory from or for which such officer is elected, and he cannot be hampered or trammeled in the exercise of such right except as every other voter in such territory is likewise restricted.
3. Where it is claimed that the legislature has not the power to enact certain legislation, it must be by virtue of some constitutional provision, and the burden of pointing out the provision rests upon the person denying the existence of the power.
4. Sub. (8), sec. 5.26, Stats., providing for the holding of a primary election in counties with a specified population two weeks prior to the regular election, where more than a specified number of candidates are nominated for certain offices filled by nonpartisan nomination and election, does not violate sec. 1, amendm. XIV, Const. U. S., nor sec. 1, art. I, Const. Wis., declaring that all men are born equally free and independent and have certain inherent rights, as neither of those provisions entitles a voter to demand that an election in one county shall be conducted in exactly the same manner as in other counties; his rights of equality are fully preserved when those rights are the same as those enjoyed by other citizens similarly situated.

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5. Sec. 23, art. IV, Const., providing that the legislature shall establish but one system of county government, which shall be as nearly uniform as practicable, has no application to the election of judicial officers, they not being county officers.
6. Said sec. 23 has no application to the election of supervisors in Milwaukee county, in view of ch. 398, Laws 1907 (held a valid enactment in *State ex rel. Scanlan v. Archibold,* 146 Wis. 363), providing for the election of a supervisor from each Assembly district in counties with a population of 250,000, as supervisors in Milwaukee county cannot be elected, under sec. 59.03, Stats., in the same manner as in other parts of the state.
7. Sub. (8), sec. 5.26, Stats., providing for a primary election two weeks prior to the election of members of the board of school directors in any city of the first class when eleven or more candidates have been proposed, is not invalid as special legislation, a law applicable to a single class of cities being a general law.
8. Sec. 6.24 and sub. (8), sec. 5.26, Stats., providing for the nonpartisan nomination and election of judicial and school officers and members of county boards in counties with a population exceeding 250,000, is not invalid though the constitution impliedly preserves to the elector the right to express his views on governmental questions through the medium of political parties; but this implied provision is not as rigid or unyielding as are the express provisions of the constitution and must be interpreted in the light of the social and economic ideals of the time. The instrumentality through which the right of suffrage is expressed may be effectually regulated according to the lights, standards, and ideals of the age, as it is subject to such changes and improvements as experience and inventive genius may devise.
9. Ch. 9, Laws 1911, relating to the civil court of Milwaukee county, is not unconstitutional as a private or local law embracing more than one subject not sufficiently expressed in the title. *In re Southern Wis. Power Co.* 140 Wis. 245, followed.

ORIGINAL ACTION in this court.

Edwin W. Knappe and *Horace B. Walmsley,* both of Milwaukee, for the plaintiff.

For the defendants there was a brief by *Winfred C. Zabel,* district attorney of Milwaukee county, *William L. Tibbs*

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and *Daniel W. Sullivan,* assistant district attorneys, *Clifton Williams,* city attorney, and *John M. Niven,* first assistant city attorney; and the cause was argued orally by *Mr. Niven, Mr. Sullivan, Mr. Tibbs, Mr. Zabel,* and *W. J. Morgan,* attorney general.

The following opinion was filed February 16, 1921:

PER CURIAM. This is an original action brought in this court, pursuant to leave first granted, to restrain the county board of election commissioners of Milwaukee county and the board of election commissioners of the city of Milwaukee from acting under and pursuant to the provisions of sub. (8), sec. 5.26, Stats. The defendants interposed a general demurrer to the complaint.

The plaintiff contends that the section contravenes several provisions of the constitution and that by reason thereof it is null and void. The specific objections of the plaintiff to the validity of this statutory provision will be considered in detail in an opinion to be filed later. It will suffice for the present purposes to say that all objections urged by plaintiff to the validity of the law have received the consideration of the court, and it is now determined and adjudged that the said law is in all respects a constitutional and valid enactment.

The demurrer to the complaint is sustained and the complaint is dismissed on the merits.

The following opinion was filed May 3, 1921:

OWEN, J. As stated in the *per curiam* memorandum heretofore filed, this is an original action brought in this court to restrain the county board of election commissioners of Milwaukee county and the board of election commissioners of the city of Milwaukee from acting under and pursuant to the provisions of sub. (8), sec. 5.26, Stats. The

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action is referred to in plaintiff's brief as one for declaratory relief, under the provisions of sec. 2687*m*. We do not, however, so regard it. The complaint plainly sets forth a state of facts entitling plaintiff to the issuance of an injunction if his contention concerning the unconstitutionality of the law in question be sustained. It sets forth that it is the duty of the county board of election commissioners of Milwaukee county to prepare and furnish the ballots to be used at and to conduct the election to be held on the first Tuesday of April, 1921, in the county of Milwaukee, of county judges of Milwaukee county, civil court judges of Milwaukee county, and a circuit judge for the Second judicial circuit of the state of Wisconsin, and that they threaten to, and unless restrained will, conduct said election pursuant to said statutory provision. A similar allegation is made with reference to the board of election commissioners of the city of Milwaukee, and prays that said boards of election commissioners be restrained from enforcing and following the provisions of said aforementioned statutes in the conduct of the election to be held on the first Tuesday of April, 1921, and all future elections, and for such further order or relief as the court may deem just and equitable.

This presents an existing controversy and a situation calling for judicial cognizance independent of sec. 2687*m*, providing for the maintenance of equitable actions to obtain declaratory relief. No action under sec. 2687*m* has come before us, and when one does, questions concerning the constitutionality of the law will arise at the very threshold which will call for the most serious consideration of the court. *Anway v. Grand Rapids R. Co.* (Mich.) 179 N. W. 350. This observation is made for the reason that this action seems to be considered by the plaintiff as one brought under that section, and it seems best that it should be distinctly understood that the constitutionality of the law has neither been overlooked nor affirmed *sub silentio*.

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Sec. 6.24 of the Statutes provides:

"No candidate for any judicial, school, member of county board in counties having a population of two hundred fifty thousand or more, or elective city office shall be elected upon any party ticket, nor shall any designation of party or principle represented be printed on the ballot used at the election of any such candidate. The statement 'a nonpartisan judiciary' or 'a nonpartisan superintendency,' or 'a nonpartisan administration' shall not be deemed a designation of party or principle within the meaning of this section. The election of members of such county boards, except as provided by subsection (5) of section 17.21 in cases of vacancy, shall be held and conducted in the manner provided for the election of judicial officers, except police justices or justices of the peace in counties having a population of three hundred thousand or more, and containing an entire judicial circuit for which more than one circuit judge is provided by law."

Sec. 5.26 of the Statutes provides for independent or nonpartisan nominations, and provides that such nominations shall be made by nomination papers, prescribes the form thereof, specifies where they are to be filed, etc. This is the manner in which the officers designated in sec. 6.24 are to be nominated. Sub. (8) of sec. 5.26 relates primarily to the officers specified in sec. 6.24 and provides, in effect, that where more than two candidates are nominated for the same office, a primary election shall be held two weeks prior to the regular election. The names of all those for whom nomination papers have been filed shall be placed upon the primary election ballot, and in each instance the two receiving the highest number of votes for each respective office shall be deemed nominated for such office, and their names and none other shall be placed upon the ballot at the general election as candidates for the offices for which they were nominated at the primary election. As it relates to members of the board of school directors in any city of the first class, it provides that this primary election shall be held when

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there have been eleven or more candidates proposed by nomination papers. The reason for this is that there are five members of the school board to be elected, and the idea of the law is that the primary or preliminary election shall eliminate all candidates except two for each office, there being five school directors to elect. It is provided that ten shall be nominated at the primary and each voter is entitled to vote for five candidates. This but follows the general scheme of presenting to the electors at the general election two candidates for each office. This scheme relates to populous counties and, as a matter of fact, is applicable only to Milwaukee county.

It is claimed by plaintiff that the legislation is unconstitutional because it amounts to special or class legislation, and that the classification has no basis germane to the purposes of the legislation. It is pointed out that in no other county of the state is this primary or elimination election provided for the officers mentioned in sub. (8) of sec. 5.26; that there is no substantial basis justifying a special election scheme such as is embodied in the provision under consideration for Milwaukee county. On the part of the defendants it is argued that the classification is justified by virtue of density of population in that county. This leads us to a consideration of the constitutional rights enjoyed by plaintiff as well as the power of the legislature to enact special legislation.

First, what are the rights of plaintiff in respect to matters under consideration? Manifestly, in the matter of elections of public officers he is entitled to the same right of suffrage that is accorded to all other electors of his election district, meaning thereby the territory from or for which a given officer is elected. He cannot be hampered or trammeled in the exercise of that right except as every other voter in the election district is likewise restricted. The law under consideration accords to him a right to vote in the same manner

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and under like conditions enjoyed by every other voter in the election district, so that, so far as the voters of the city or county of Milwaukee are concerned, they are on a perfect equality with reference to all things pertaining to the exercise of the right of suffrage in the election of the city and county officers specified in the provision under consideration. Plaintiff, however, claims that his constitutional right is not only that of equality with all other voters in the election district in which he resides, but that he is entitled to exercise that right in the same manner that it is exercised by the voters in other counties of the state with reference to the same or similar officers, and that the legislature cannot provide for an elimination election for judicial officers, for instance in Milwaukee county, unless it provides the same thing in all other counties of the state. If the legislature does not possess this power, it must be by virtue of some constitutional provision, and the burden of pointing out such provision rests upon the plaintiff.

"As often said and always conceded, our state constitution is not so much a grant as a limitation of powers; and hence the state legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution." *Bittenhaus v. Johnston*, 92 Wis. 588 (66 N. W. 805), at p. 595.

Sec. 31 of art. IV of the constitution prohibits the enactment of any special or private laws in the cases therein mentioned, but there is nothing in that section which expressly or by the remotest inference prohibits the legislature from enacting special laws for the conduct of elections in the various communities of the state. In fact this was notoriously done when the legislature exercised the power of incorporating cities and villages by special act. The special charters incorporating such cities or villages included provisions for the holding of municipal elections. These were not by general laws but by special act. Sec. 31 of art.

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IV now contains a provision prohibiting the incorporation of cities or villages by special act, hence all such laws are now by general act. The provision, however, goes to the incorporation of cities or villages, and, as the greater includes the lesser, the scheme of municipal elections must be as general as the acts of incorporation for municipalities. But that does not include the election of county officers. We find no express restriction upon the power of the legislature to provide that in a populous county like Milwaukee there shall be an elimination of a multiplicity of candidates for the various offices by a preliminary election, and that but two candidates for each office shall be presented to the electors at the election.

Plaintiff refers to sec. 1 of the Fourteenth amendment of the constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and to sec. 1 of art. I of the state constitution, which provides that "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." These constitutional provisions secure to every citizen the rights and privileges enjoyed by all other citizens similarly situated. He enjoys the right to vote for judicial and school officers of Milwaukee county in the same manner, at the same time, and with the same effectiveness that any other elector of that county enjoys. No one except electors of that county are interested in the election of those officers. Neither is the plaintiff, who is an elector in Milwaukee county, interested in the election of similar officers in any other county of the state. He has no right to demand that an election for judicial or school

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officers in Milwaukee county be conducted in exactly the same manner it is conducted in other counties of the state. His rights are not to be determined by a comparison with the rights enjoyed by citizens of other counties in which he has no interest. The rights of equality guaranteed to him by the state and federal constitutions are fully preserved when those rights are the same as those enjoyed by other citizens similarly situated, which in this instance are electors of Milwaukee county. This conclusion goes far towards disposing of the manifold objections raised by plaintiff to the validity of this legislation, to which special reference will not be made. There are, however, some considerations peculiar to each class of officers mentioned in sub. (8), sec. 5.26, to be considered.

As to judicial officers and members of the county board of supervisors, it is urged that the legislation under consideration offends against sec. 23 of art. IV of the constitution, which provides: "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." This contention, so far as it relates to judicial officers, may be disposed of by a reference to our former decisions, in which it has been settled that the judicial power of the state is separate and distinct from the system of county government referred to in sec. 23 of art. IV, and that judges are not county officers. *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475; *Milwaukee Co. v. Halsey,* 149 Wis. 82, 136 N. W. 139.

In counties having a population of at least 250,000 a supervisor is elected from each Assembly district. In other counties a supervisor is elected from each town, city, ward, and incorporated village. Sec. 59.03, Stats. Prior to the enactment of ch. 398, Laws 1907, the county board of supervisors in every county was composed of the chairmen of the town boards and a supervisor elected from each city, ward, and incorporated village. By the latter act it was

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provided that in counties having a population of at least 250,000 a supervisor should be elected from each Assembly district. The constitutionality of this law was sustained in *State ex rel. Scanlan v. Archibold,* 146 Wis. 363, 131 N. W. 895. Assuming, therefore, that supervisors are county officers, the constitutionality of the act providing that they be elected from Assembly districts in counties having a population of 250,000 or over, instead of from towns, cities, wards, or incorporated villages, is no longer an open question. The constitutionality of the act providing for their election from Assembly districts being established, it necessarily follows that supervisors in Milwaukee county cannot be elected in the same manner that supervisors are elected in other parts of the state, because an Assembly district includes a number of towns, and perhaps incorporated villages and cities. If their election from Assembly districts instead of from towns, cities, wards, and incorporated villages be constitutional, then it follows that the legislature is at liberty to provide a different method for their election without offending against the provisions of the state constitution requiring a uniform system of county government. and that the law in question cannot be condemned because it conflicts with that provision of the constitution so far as the election of supervisors is concerned.

While the provision of sub. (8), sec. 5.26, Stats., relating to the election of school directors in cities of the first class is assailed as special legislation, we must confess our inability to appreciate the force of this contention. The general charter law provides for cities of the first class. Ch. 459, Laws 1907, provided that

"The public schools in every city of the first class, whether organized under general or special charter, shall be under the general management, control and supervision of a board of school directors, consisting of fifteen members from the city at large, selected as provided in this act."

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It has been settled that laws applicable to a single class of cities are general laws. *Milwaukee v. Reiff,* 157 Wis. 226, 146 N. W. 1130; *State ex rel. Bloomer v. Canavan,* 155 Wis. 398, 145 N. W. 44; *Wis. Cent. R. Co. v. Superior,* 152 Wis. 464, 140 N. W. 79. Sub. (8), sec. 5.26, Stats., provides for the election of these school directors. It is applicable to all cities of the first class. It is certainly a general law, as the classification therein made (cities of the first class) is firmly established by the decisions of this court as a valid classification.

It was contended upon the oral argument that the law is unconstitutional because it provides for a nonpartisan nomination and election. In this connection it is maintained that the constitution protects and preserves political parties, and that any law providing for an election which deprives a political party of the right to put a ticket in the field and have the names of its candidates placed on the ballot in a manner to indicate their political affiliations is unconstitutional and void. The case of *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N. W. 1041, is relied upon as firmly intrenching that principle in the jurisprudence of this state. In that case it was said that inherent in the right to vote "exists a right of persons to combine according to their political beliefs, and right, so far as not reasonably prohibited by law, of each group to possess and use freely all the machinery for increasing the power of numbers by acting as a unit—over the power acting individually, to effect a desired political end,—goes without saying. This, and all courts which have dealt with the matter, have so declared, and recognized that political parties with freedom of action, as broad as freedom of use of the elective franchise, to the end that the public welfare, for which governments exist may be best promoted,—are essential to our form thereof." Page 16. A perusal of the opinion in that case, as well as the opinions in cases from other

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jurisdictions therein cited, indicates that the preservation of political parties is impliedly secured by the constitution. It is conceded, of course, that the constitution does not in express terms provide that political parties shall be eternally protected. Neither do we think that such is the spirit of the various decisions bearing upon this question.

The right of suffrage is secured by constitutional provision, and it is argued that in order to make this right effectual it is necessary to secure to the voter the right to express his views concerning governmental policies through the medium of a political party. This, of course, is on the assumption that group action on the part of voters, each respective group being designated as a political party, is essential under our form and scheme of government, as the establishment of principles rather than the choice of men generally enlists the primary interest of the voter. With this there can be no serious quarrel. But the question arises whether this be true if in the course of time, in the evolution of society and in the progress of governmental development, the preservation of political parties shall be deemed destructive rather than promotive of the public interest. We should bear in mind that the express right preserved by the constitution is the right to vote. This right is coupled by implication with the institution designed and employed by society for its effectual exercise. As any interference with the instrumentality through which the right may be most effectually exercised, according to existing standards and ideals of society, impairs the right, the constitutional protection extends to such instrumentality as well as the right. The right is fixed and permanent, but as the agency through which it is exercised is an invention of society, it is subject to the changes inevitably wrought from time to time by social and economic inventive genius. Society is in a progressive state moving on towards perfection. "The political or philosophical aphorism of one

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generation is doubted by the next, and entirely discarded by the third; the race moves forward constantly, and no Canute can stay its progress." While the existence of political parties with which the individual voter may affiliate and through which he may give expression to his views concerning governmental policies is now deemed essential to our scheme of government, who can say that this view may not be discarded by future generations and the existence of political parties be held inimical rather than promotive of the general welfare? Indeed, sentiment along this line has crystallized since the decision in *State ex rel. McGrael v. Phelps, supra,* was announced. The language of that decision is all-inclusive, and extends to municipal as well as state and national elections. Public sentiment has rapidly crystallized since that time upon the proposition that party politics has no proper place in the conduct of municipal elections or of municipal affairs. The crystallization of this sentiment has been followed by legislation in this state having for its purpose the utter elimination of partisan considerations from municipal elections.

The first legislation of this character was ch. 670, Laws 1907, which provided for a nonpartisan election in cities adopting the provisions of the law. From the optional form of the law it may be inferred that it was in response to a growing, although perhaps a divided, sentiment upon the question. The law was not compulsory upon all cities, but was made available to the municipalities where the public sentiment favored a nonpartisan administration of municipal affairs. Evidently sentiment upon the question developed rapidly, for by the provisions of ch. 11 of the special session of 1912 it was provided that "no designation of any party or principle shall be used for any candidate for an elective office in any city on nomination papers or ballots at any general municipal election or primary therefor." The act then provides the machinery for the conduct

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of a primary and election along purely nonpartisan lines. This law has remained upon the statute books ever since, with no attempt or disposition to repeal it. This is indicative of a complete change of public sentiment with reference to partisan politics in municipal affairs. It was brought about, no doubt, as a result of numerous exposures of graft and scandal in the administration of public affairs in many of the large cities of the nation.

In view of this unmistakable change of public sentiment, is it to be claimed that partisan politics must persist in municipal affairs because it is said that the continued existence of political parties is guaranteed by constitutional provision? We think not. We do not think an amendment of the constitution is necessary in order to substitute a nonpartisan for a partisan form of municipal election. In this we give the same force and scope to the constitutional provision under consideration in *State ex rel. McGrael v. Phelps, supra,* as was there accorded it. As already stated, the express right conferred by the constitution is the right to vote. This implies the right to make use of the vote in a most effectual manner. Under conditions existing at the time of that decision this implied the right to affiliate with, and to express one's views through the medium of, a political party. So far as municipal elections are concerned, this idea is now repudiated by common consent, and the settled convictions of the people of this state now are to the effect that the end to be attained by the exercise of the right of suffrage, to wit, good and efficient government and the promotion of the general welfare, can best be attained in municipal affairs not through partisan politics but along nonpartisan lines. The same reasons, therefore, which have prompted this and other courts to say that the existence of political parties is protected by constitutional provision compel us to say that in municipal affairs a nonpartisan system of elections is likewise protected by virtue of the

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express provision of the constitution conferring upon a certain class of citizens the right of suffrage. In other words, the nonpartisan system of elections in municipal affairs furnishes the effectual means for the exercise of that right, in the light of existing social standards and ideals.

Did the constitution expressly preserve the institution known as a political party, we could not arrive at this conclusion. But there is no such express provision. It is an implied provision with which we are here dealing—an implied provision which preserves to the elector the means through which the right may be effectually exercised according to the lights, standards, and ideals of the age. The constitution makes no attempt to define or give immutable shape to that instrumentality. The instrumentality, therefore, is not a constitutional device, but rather an invention of society, and as such is subject to such changes and improvements as the experience and inventive genius of society may devise. The instrumentality protected by the constitution is not one of specific and unyielding form and shape, but it is the most recent, most perfect, and most effectual instrumentality evolved by the experience and constantly increasing enlightenment of society. This court has said that implied provisions of the constitution are not as rigid and unyielding as the express commands thereof, and that they are to be interpreted in the light of the social and economic ideals of the time. This idea finds most lucid expression in the following language of the late Mr. Chief Justice WINSLOW in the case of *Borgnis v. Falk Co.* 147 Wis. 327 (133 N. W. 209), at page 349:

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential

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factors in the settlement of problems of construction and interpretation."

This is also the reason why a decision of the supreme court of the United States declaring unconstitutional a law of the state of New York limiting the hours of labor for bakers (*Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. 539) is not necessarily inconsistent with a later decision of that court declaring constitutional a law of the state of Oregon limiting the hours of labor of persons employed "in any mill, factory or manufacturing establishment." *Bunting v. Oregon,* 243 U. S. 426, 37 Sup. Ct. 435.

The social and economic standards and ideals of the times unquestionably influenced those apparently conflicting decisions. During the interim from 1905, when the New York case was decided, to 1917, when the decision in the Oregon case was announced, scientific activity had demonstrated that there is a limit to the hours during which men and women may labor without deleterious results to health inimical to public welfare and future generations. Therefore, legislation substantially similar to that held to constitute an unwarranted interference with the right to contract in 1905, was held to be a legitimate exercise of the police power of the state in 1917.

Instances taken from the reports of judicial decisions could be multiplied to illustrate the influence which changed economic conditions and the varying ideals of society have had upon the interpretation of implied provisions of constitutions, or, perhaps more properly stated, to illustrate the character of implied provisions which the courts have read into constitutions, but to do so would prolong this opinion without serving any good purpose.

That part of the provision of sub. (8), sec. 5.26, relating to civil courts in Milwaukee county was first enacted as ch. 9, Laws 1911. It is contended that law is unconstitutional because it was a private or local law, embracing more than one

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subject, and that subject was not sufficiently expressed in the title. We regard the contention as hypercritical. The law on this subject is comprehensively reviewed in the case of *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801, and it is unnecessary for us to discuss this question any further than to say that the principles of that case negative plaintiff's contention.

The foregoing sufficiently indicates the reasons prompting the court in rendering the judgment heretofore entered dismissing plaintiff's complaint.

WILL OF VERVOREN: CLAIM OF ALLIE LEWIS.

March 10—May 3, 1921.

Wills: Construction: Son-in-law not within class designated as "children."

A clause in a will that any amount allowed to any of the children of testatrix on a claim for personal services to testatrix or to any of her children or adopted children should be deducted from the share of the claimant does not authorize the deduction of the amount allowed to a son-in-law for the support of an adopted child of testatrix from the share of a daughter who was claimant's wife, since the word "children" cannot be extended by construction to include the husband of a child.

APPEALS from an order of the county court of Brown county: CARLTON MERRILL, Judge. *Affirmed in part; reversed in part.*

Elizabeth Vervoren left surviving twelve children, all of full age. In addition to these she left surviving two grandchildren, daughters of a deceased daughter. She had legally adopted the grandchildren. Shortly after the grandchildren had been adopted and taken into the family of the testatrix, one of them, Rita, for some reason, chose to stay with *Annie Lewis*, a daughter of the testatrix and aunt of the child.

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The testatrix left an estate appraised at $6,014. To the adopted daughters, her grandchildren, she gave $1,000 each. The remainder of her estate she divided into twenty-two equal parts, the daughter, *Annie Lewis,* taking one eleventh. The seventh paragraph of the will is as follows:

"(7) Should any of my children put in any claim against my estate for personal services to me or to any of my children or adopted children or for any care or support of me or of any of my children, or adopted children, whatever amount the court shall allow to any of my children upon such claims shall be deducted from the amount bequeathed to the one who shall recover said claim against my estate. I have placed this provision in my will because no just claim can be made against my estate by any of my children and I am determined that no advantage shall be taken of my death to recover claims which I would not allow if living."

Allie Lewis, husband of *Annie Lewis,* son-in-law of the deceased, filed a claim against the estate of the testatrix for the care of the adopted daughter Rita for three years and two months at $10 per month. The trial court allowed the claim, but provided that it should be paid out of the amount due to *Annie Lewis,* wife of the claimant, she being one of the children of the deceased, such direction being made pursuant to paragraph 7 of the will of the testatrix. The legatee, *Annie Lewis,* appeals from so much of the order as directs that it should be paid out of the amount due her. The executor appeals from that part of the order allowing the claim.

For the appellant *Annie Lewis* and respondent *Allie Lewis* there was a brief by *Kittell, Jaseph & Young* of Green Bay, and oral argument by *L. D. Jaseph.*

C. W. Lomas of Green Bay, for the respondent and appellant *Vervoren,* executor.

ROSENBERRY, J. Upon the appeal of the executor it is claimed that there was not sufficient evidence to overcome

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the presumption that, the service having been rendered to a near relative, it was therefore presumed to be gratuitous. It appears from the opinion of the trial court that he considered the matter, giving full effect to the contention made here by the executor, and found that there was sufficient evidence to overcome the presumption. We see no reason for disturbing the court's finding in that respect.

Upon the authority of *Will of Boeck,* 160 Wis. 577, 152 N. W. 155, the county court was of the opinion that although the claimant was a son-in-law and not a child of the testatrix, nevertheless the provisions of paragraph 7 of the will should apply and offset the claim of *Allie Lewis* against the legacy of *Annie Lewis.* The trial court says:

"From the four corners of the will, read in the light of surrounding circumstances, the intent of this testatrix is clearly discernible.

"She first makes a liberal provision, considering the size of her estate, for the future education and care of her two adopted grandchildren, and divides the residue equally among her children, and in the most emphatic manner declares, in effect, that no action on the part of one branch of the family shall work to the detriment of the others. I have not the slightest doubt that this identical claim was in her mind when she made the seventh paragraph of her will and that it was her intent that should a claim be allowed for the care of Rita in the Lewis home, the same should be deducted from the bequest to *Mrs. Lewis.* That such a claim shall not work to the detriment of her other children seems clearly the intent. To allow this claim and fail to require its payment out of the share of *Mrs. Lewis* would be doing plain violence to the wish of the testatrix."

The construction placed upon the transaction by the trial court in effect amends the will of the testatrix. The language of the seventh paragraph does not include the husband or wife, as the case might be, of any of her children. In *Will of Boeck,* 160 Wis. 577, 152 N. W. 155, the testator owned eighty acres of land described as the

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south half of the northwest quarter of section 13. He disposed of all of his property with the exception of the southwest quarter of the northwest quarter, which was not mentioned in the will, nor did the will contain a residuary clause. To his son Herman August Boeck he gave the northeast quarter of the northwest quarter of section 13, which he did not own. In the light of the surrounding circumstances it was the opinion of this court that the intent of the testator to give his son Herman August the southwest quarter of the northwest quarter, which he did own and which was not otherwise disposed of by the will, was clearly apparent, and the will was so construed. The terms of the will, in the light of the surrounding facts and circumstances, were not applicable to the situation that confronted the testator. It was clearly apparent that he intended to give forty acres of land to his son Herman, and the only land which was available for that purpose was the southwest quarter of the northwest quarter. Here, however, no uncertainty of meaning arises by applying the words of the will to the subject with which it deals, nor is there any ambiguity in the language itself. It may well be suspected that the testatrix intended to do what the trial court says she intended to do, but that intention does not become apparent either from the language of the will standing by itself or when applied to the circumstances which surrounded the testatrix. The trial court says that there is no doubt in his mind that the testatrix had in her mind the claim under consideration. A daughter and a son lived with her in her home and took care of her. There is no reason disclosed by the record why the terms of the will were not applicable to such claims as might be put forward by the son or the daughter who lived with her. There existed a situation to which the language was applicable. We are of opinion that the word "children" cannot be extended by construction to include the husband of a child. We are cited to no case so

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holding, and the great weight of authority is against it. 11 Corp. Jur. 753, cases cited in notes 98 and 99.

By the Court.—That part of the order appealed from by the legatee, *Annie Lewis,* is reversed. That part of the order appealed from by the executor is affirmed. The case is remanded with directions to the county court to enter judgment in accordance with this opinion. Disbursements to be paid out of the estate. No other costs to be taxed.

ESCHWEILER, J., dissents.

IN RE PETITION OF INLAND STEEL COMPANY.
KEATING, Plaintiff, vs. INLAND STEEL COMPANY, Defendant.
HALEY, Plaintiff, vs. SAME, Defendant.

April 5—May 3, 1921.

Prohibition: When jurisdiction is exercised: Invalid service on foreign corporation: Ownership of property as requisite of service.

1. This court in *Petition of Pierce-Arrow Motor Car Co.* 143 Wis. 282, restricted its superintending control by writs of prohibition to a minimum; but, without intent to overrule that decision, it is *held* that a writ of prohibition will issue if a careful consideration of all the facts shows that a valid service has not been made.
2. In cases involving the validity of service, extraordinary hardship is inherent because the defendant must suffer a default judgment to test the question of the validity of the service, or else apply for a writ of prohibition, as there is no appeal from an order holding the service valid, and by appearing on the merits the question of jurisdiction is waived.
3. Property in the state which, by sub. (13), sec. 2637, Stats. 1919, a foreign corporation is required to have in order to make valid service of process on it in an action by a nonresident on a cause of action arising without the state, must be of a substantial nature; mere ownership of office supplies

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used by a soliciting agent in connection with his duties is not enough to give the court jurisdiction of an action begun by service on such agent.

PETITIONS for writs of prohibition to restrain the further prosecution of two suits in the circuit court for Douglas county on the ground that the summons had not been properly served on the petitioner, which is a foreign corporation. *Writs allowed.*

The facts in the two cases are identical so far as the merits of the petitions are concerned, and they will therefore be treated as one. Both plaintiffs are nonresidents of Wisconsin and the cause of action did not accrue in this state but in Minnesota. Suits were brought in the federal district court of that state, which were pending at the time the petitions herein were filed, but which had been dismissed at the time of the oral argument. The causes of action grew out of alleged improper mining methods in operating a mine in Crow Wing county, Minnesota. Service of summons was made on C. M. Easterly, an agent of the defendant at Milwaukee, on the 31st day of January, 1921.

The validity of such service is sought to be sustained by an affidavit of C. R. Fridley, one of the attorneys for plaintiffs, made upon information and belief, to the effect that defendant has property in this state consisting of office furniture and fixtures, a lease of the office occupied by its agent, C. M. Easterly, in Milwaukee; that it also has credits for manufactured products sold to residents of this state who are solvent, and has manufactured products sold but undelivered in this state, and upon personal knowledge it is stated that the name of the defendant appears upon the outside door of the offices occupied by its agent, C. M. Easterly, at Milwaukee.

The opposing affidavits are made by D. P. Thompson, assistant to the president of the defendant, and by C. M. Easterly, its agent at Milwaukee. They are made upon

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personal knowledge and deny that defendant has any property in Wisconsin "save such office stationery and supplies necessarily used by C. M. Easterly as its soliciting agent in connection with his duties . . . and which stationery and supplies are of no value to any person or corporation than to this defendant, save and except such intrinsic value as they may have, separate and apart from their uses as the property of the defendant." The lease, it is alleged, is the personal property of the agent, Easterly, who transacts other business than that of the defendant in the office occupied by him; that the office is leased for his own personal use and purposes. It is further alleged that all shipments of manufactured products are made by defendant from its manufacturing plants located outside of Wisconsin, and that when delivery is made f. o. b. cars, its right, title, and interest in the goods shipped ceases. The allegations in the respective affidavits as to the nature and extent of the business carried on in this state by the defendant are omitted, as we do not find it necessary to consider the question of whether or not defendant was carrying on a business in this state.

For the plaintiffs there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

For the defendant there were briefs by *Hanitch, Hartley & McPherson* of Superior, attorneys, and *Abbott, MacPherran, Gilbert & Doan* of Duluth, Minnesota, of counsel; and the cause was argued orally by *T. W. Doan* and *E. W. MacPherran.*

VINJE, J. The conditions upon which this court will exercise its superintending control in questions now before us were thoroughly discussed in *Petition of Pierce-Arrow Motor Car Co.* 143 Wis. 282, 127 N. W. 998, and will not now be restated. The court there restricted its power to its minimum sphere, and while there is no intent to overrule

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the decision in that case upon the facts there present, it is the opinion of the court that jurisdiction may properly be exercised though the duty of the court below may not be so plain as to permit of but one conclusion, if a careful consideration of all the facts shows that a valid service has not been made. In cases involving the validity of the service of summons, extraordinary hardship is inherent when such service is held valid by the trial court, because the defendant has to suffer a default judgment in order to test the question of the validity of the service (*Rix v. Sprague C. M. Co.* 157 Wis. 572, 147 N. W. 1001), or else apply for a writ of prohibition, there being no appeal from an order holding the service valid, and the rule of this state being that if appearance is made on the merits the question of jurisdiction is waived. *Corbett v. Physicians' C. Asso.* 135 Wis. 505, 115 N. W. 365. In one of these cases judgment in the sum of $212,500 is demanded and in the other in the sum of $157,916.67, so the situation of defendant is quite serious. It has to wager those amounts on the validity of the service or else waive that question.

Coming now to the merits, it will be seen from the statement of facts that the allegations of the plaintiffs as to the defendant's possession of property in this state are upon information and belief, and that those of the defendant are upon personal knowledge. It appears that the only property that the defendant has in this state consists in some office supplies. Is this sufficient to give the court jurisdiction? Sub. (13), sec. 2637, Stats. 1919, as to service provides:

"If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in section 1770*b*. But such service can be made upon a foreign corporation only either when it has

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property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein."

It will thus be seen that in cases of this kind where the plaintiffs are nonresidents and the causes of action arose outside of the state, in order to make a valid service upon a foreign corporation by serving an agent it must conduct a business in this state through the agent served, and it must also have property within the state. The reasons for such provisions are obvious. Our courts should not be required to hear and determine cases arising outside of the state between nonresident parties nor should our taxpayers be subjected to the expense of such trials when plaintiffs can gain nothing substantial thereby. But when a foreign corporation is doing business in the state and has property within it that can be reached on execution, a sound interstate comity says then our courts shall be required to do the work and the taxpayers to pay the expense of the trial, for the plaintiff may be able to satisfy his judgment in whole or in part in this state. It has therefore generally been held that the property must be of some substantial nature; that the mere ownership of some office supplies is not enough to give the court jurisdiction. *Strom v. Montana Cent. R. Co.* 81 Minn. 346, 84 N. W. 46; *Barnes v. M. & N. W. R. Co.* 12 Hun, 126. We concur in such view and hold for that reason that no valid service was made upon the defendant in either case.

Upon the question as to whether or not the defendant was conducting business within the state within the meaning of the statute we express no opinion.

By the Court.—Let writs of prohibition issue as prayed for in the petition.

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WILL OF BRITT.

April 5—May 3, 1921.

Wills: Construction: Devise of life estate with election to sell: When election must be exercised: Power of sale in will: Trial: Opinion of county court as findings: Failure to object to insufficiency: Effect: Necessity of findings.

1. In a proceeding by an executrix for the allowance of her account, where there is no bill of exceptions and no exceptions were taken in accordance with secs. 2870, 3070, Stats., the only question before the court is whether the judgment is sustained by the pleadings in the case—the application for allowance of the account and objections and the findings of fact.
2. Where the court made no findings of fact and conclusions of law under sec. 2863, Stats., but his opinion contained statements of fact, and appellant took no exception to the failure to find the facts separately and in her brief referred to the facts stated in the opinion as found by the court, she was not misled, and such statements of fact may be considered as equivalent to findings of fact and given the weight accorded such findings.
3. Under sec. 4031, Stats., authorizing a direct appeal from the county courts of certain counties to the supreme court, formal findings of fact and conclusions of law as provided by sec. 2863 are as important in those county courts from which an appeal lies directly to the supreme court as in the circuit and other courts.
4. Under a will giving the testator's niece a life estate in the homestead and after the death of her mother, who was also given a life estate, giving her the election to rent it and receive the proceeds, and providing that, if she preferred, the premises might be sold and the proceeds divided between herself and two others, her election to sell and take one third of the proceeds must be exercised at the time of the death of the mother or within a reasonable time thereafter, and she could not occupy the premises for twenty years after her mother's death and then exercise such right of election.
5. Although the will also authorized the executrix "to sell my

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real estate as hereinbefore provided," it gave her no authority to sell the property after occupying it for twenty years, as the sale was not upon one of the occasions provided in the will.

APPEAL from a judgment of the county court of Columbia county: A. F. KELLOGG, Judge. *Affirmed.*

F. W. Hall of Madison, for the appellant.

For the respondents there was a brief by *E. S. Baker,* attorney, and *H. E. Andrews,* of counsel, both of Portage; and the cause was argued orally by *Mr. Andrews.*

JONES, J. In the county court of Columbia county the executrix of the will of C. C. Britt, deceased, applied for the allowance of her account as executrix and for a construction of the will. Objections were filed by one of the legatees. From the judgment disallowing a number of credits claimed by the executrix in her account and construing the will adversely to her claim she brings this appeal.

There is no bill of exceptions. Nor were any exceptions taken in accordance with the statute. Secs. 2870, 3070. This being the fact, the only question necessarily before the court on this appeal is whether the judgment is sustained by the pleadings in this case, the application for allowance of the account and objections, and the findings of fact by the trial court. *Blossom v. Ferguson,* 13 Wis. 75; *Newton v. Williams,* 94 Wis. 222, 68 N. W. 990; *Hallam v. Stiles,* 61 Wis. 270, 21 N. W. 42; *Saukville v. Grafton,* 68 Wis. 192, 31 N. W. 719; *Meseberg's Estate,* 91 Wis. 399, 64 N. W. 1002; *Statkawicz v. Laguna,* 155 Wis. 304, 143 N. W. 677, 144 N. W. 1133; *Foote v. Foote,* 159 Wis. 179, 149 N. W. 738. Numerous other cases might be cited to the same effect.

It is true that in this case the trial court made no separate findings of fact and conclusions of law in accordance with sec. 2863, Stats. He however filed a decision signed "By

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the Court," followed by the signature of the judge and indorsed "Opinion." Judgment was rendered "pursuant to said opinion." The opinion contains statements of facts concerning the issues involved. We find no requests by appellant for findings of fact, nor any exception to the failure to find the facts separately or to the method pursued by the trial court. Appellant's counsel in their assignments of error and elsewhere in their brief refer to the court as "finding" facts thus stated in the opinion. In view of these circumstances we do not feel that appellant has been misled by the failure of the trial court to make formal findings of fact, and we hold that statements of fact in the opinion may be considered on this appeal as equivalent to findings of fact and entitled to the weight accorded to such findings. *Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562. And see *Jones v. Foster,* 67 Wis. 296, 310, 30 N. W. 697; *Wrigglesworth v. Wrigglesworth,* 45 Wis. 255.

This holding is not to be construed as in any way approving the failure of trial courts to make formal findings of fact and conclusions of law as provided by the statute. The statute should be followed, and its observance is just as important in those county courts from which appeal now lies directly to this court under the provisions of sec. 4031 as in the circuit and other courts. Under the former practice, when all appeals from the county court ran directly to the circuit court, where the trial was *de novo,* the making of findings may have been comparatively unimportant. The new statute imposes new responsibilities on the county courts and makes it important for attorneys who desire to appeal to see that the record complies with the statutes. These observations are not to be construed as discouraging but rather as encouraging the filing of opinions accompanying the decisions of trial judges if they are not overcrowded in their work. We often find these opinions very able and very useful.

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Among the facts found by the trial court are the following: Deceased died July 31, 1897, and his will was shortly thereafter admitted to probate. Portions thereof material to this appeal are as follows:

"Second. I give and bequeath to my niece, *Miss Lida Gilman,* all my personal property of whatever kind or nature, to use and dispose of as she may deem best.

"Third. I give and bequeath the use of my homestead . . . to my sister-in-law, Mrs. Emily C. Gilman, during her lifetime, and to my said niece, *Lida Gilman,* during her lifetime, or until she shall marry and be otherwise provided for. . . . Should my said niece survive her mother and not wish to occupy said premises, I direct that she rent the same and receive the proceeds thereof until the time of her death or marriage as aforesaid. Or, if she so prefers, the said premises may be sold and the avails thereof be equally divided between herself and my two sisters, Mrs. Elmira Cone of Rome, New York, widow, and Mrs. Elvira Law of Toledo, Ohio. But if my said niece should not so prefer, then after her death or marriage said premises shall be sold and the avails thereof divided equally between my said two sisters. In case of the death of my said sister, Elmira Cone, before my estate shall be settled, her share of this bequest shall be divided share and share alike between her two daughters, *Elvira Cone* and *Mrs. Emma Allen,* and in case of the death of my said sister, Mrs. Elvira Law, before my estate is settled, her share of this bequest shall be divided share and share alike between her three daughters, *Mary, Emma,* and *Cora Law.*

"Fourth. In case I should not in my lifetime dispose of my farm known as outlots Nos. 46, 47, 48, and 49, . . . I direct that the same be sold and the proceeds thereof applied to the payment of the mortgage of $1,400 on my homestead, and the remainder, if any there be, I give and bequeath to my said widowed sister, Elmira Cone, if living at the time, and, if not so living, to her daughter, *Elvira Cone.*

"In making the foregoing bequests I have had well in mind the names and condition of all my nephews and nieces and think the same will be most beneficial as I have made them.

"Fifth. I hereby authorize and empower my executrix

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or whoever may be appointed to succeed her in case of her death, to sell all my real estate as hereinbefore provided, and to convey the same by proper deeds as fully as I could do if living."

The will appointed the niece, *Lida Gilman,* executrix. She accepted the trust and still acts. Judgment on claims was entered in April, 1898. In 1901 an inventory of real and personal property was filed, and thereafter nothing appeared of record until the submission of the present matter in 1920.

Emily C. Gilman, one of the designated life tenants, occupied the homestead until her death in 1900. Since that date the appellant, the other life tenant, has occupied the house as her home. After such occupancy for twenty years following the death of her mother, appellant now claims the right to sell the homestead under clause 3 of the will and take one third of the proceeds. Subsequently to the filing of her original account she assumed to make a sale thereof and in a supplementary account asked that the proceeds be distributed in accordance with her claims.

The trial court, in effect, construed the will as requiring that appellant's election to sell must have been exercised, if at all, at the time of her mother's death, or within a reasonable time thereafter, and that after occupancy for twenty years it could not now be exercised. He adjudged that the homestead be set over to the remaindermen named in the will, subject to appellant's life estate and certain liens, notwithstanding the assumed sale by her. These determinations are assigned as error.

The testator in his will expressed much gratitude toward appellant and her mother for having cared for his home and for himself during sickness. He evidently desired to provide a home for appellant's mother during the continuance of her life, and for appellant for her life or until she might marry and be otherwise provided for. He anticipated that

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appellant might not wish to occupy the homestead after her mother's death and provided that she might rent it and receive the proceeds during the period she would otherwise be entitled to occupy it. Or, he provided, if appellant preferred she might sell it and take one third of the proceeds and pay over two thirds to his two sisters or certain of their children. Or, if she did not so prefer, it was to be sold upon appellant's death and the entire proceeds divided among those who were to get the two thirds in case appellant preferred to sell it as provided.

This clause is not entirely free from doubt, but in our opinion the construction placed upon it by the trial court is correct. The main purpose of the testator in regard to appellant was evidently to give her the use of or income from the homestead for life, or, if she preferred, to enable her to sell it and take one third of the proceeds as a commutation of her life interest. To adopt the construction for which appellant contends, however, would enable her not only to use the homestead for part or most of her life, but also to receive the third of the capital value. There is nothing in the will to indicate any intent to enable appellant to benefit her estate after her death. The provisions for the benefit of appellant as to the homestead were in the alternative, not in the conjunctive. She probably believed that the provision for the exclusive use of the premises for the period named in the will was more beneficial than the right to sell and take one third of the proceeds. The claims that she could occupy the homestead for twenty years or until her last illness and that she could then sell it and take part of the proceeds seem to us wholly inconsistent. We construe the will to the effect that the election to sell was intended to be exercised upon the death of appellant's mother or within a reasonable time thereafter. That time has obviously expired.

But, appellant contends, the sale which she has assumed to

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make has operated to convey the homestead by reason of the power of sale contained in clause 5 of the will. But that power is expressly limited "to sell . . . as hereinbefore provided." The sale was not upon one of the occasions provided, and the clause cannot avail appellant.

In view of what was said earlier in this opinion it is unnecessary to more than refer to the other assignments of error, bearing upon the disallowance of certain items of appellant's account. The trial court found that the failure of appellant to sell the outlots mentioned in the will within a reasonable time caused unnecessary interest and taxes to accrue which could not be charged against the estate in view of sec. 3926, Stats. The claim that the court erred in not allowing a credit for taxes is apparently based in turn upon the claim that the court erred in finding the above fact, at least no argument is presented upon questions of law. The same is true of that part of the third assignment claiming error because the trial court did not allow to appellant a percentage upon the personal property handled. We also fail to find that any such claim was made in the account submitted to the court below. Nor is there any argument in the brief that under sec. 3929 and under the facts in the case commissions should be allowed.

Although we are not required upon the state of the record to examine the evidence submitted, we have exercised the discretion allowed to us under sec. 2405*m*, Stats., and have examined the transcript of testimony certified to by the reporter of the trial court to such an extent that we are satisfied that no injustice has been done.

No other matters adjudged by the trial court are assigned as error.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

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SCHMOLDT, Appellant, vs. LOPER, Respondent.

April 5—May 3, 1921.

Easements: Oral license to drain surface water: Permissive user: Termination: Trial: Findings of fact: Form and sufficiency.

1. Sec. 2863, Stats., requiring the filing of findings of fact and conclusions of law by the trial court, is not satisfied by the filing of an opinion containing a statement of evidentiary facts followed by a discussion of the law, as the ultimate facts in issue should be found in every case. The failure to follow the statute, however, is not necessarily reversible error.
2. An oral license to drain surface water across the land of another does not create an easement, even though a valuable consideration is paid for it; and so long as the drainage was by permission of the landowner it could not ripen into an adverse use.
3. An oral license to drain surface water across the land of another is not assignable, is revocable at will, and terminates if either party dies or the licensor deeds his land to another.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to enjoin defendant from stopping up a drain that conveyed surface water from plaintiff's land over that of the defendant. The latter counterclaimed for an injunction restraining plaintiff from discharging surface water upon his land. Plaintiff's claim was founded upon adverse user. The court found against him and entered judgment dismissing the complaint upon the merits and also dismissed the counterclaim. From such judgment the plaintiff appealed.

For the appellant there was a brief by *Hooper & Hooper* of Oshkosh, and oral argument by *Moses Hooper.*

For the respondent there was a brief by *Duffy & McGalloway* of Fond du Lac, and oral argument by *F. Ryan Duffy.*

VINJE, J. The trial court filed no findings of fact and conclusions of law as the statute requires. Sec. 2863,

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Stats. Instead he filed an opinion of seven pages, four of which contained a statement of "evidentiary facts." At least that is what the court denominates them. It says: "From the evidentiary facts above stated must be drawn the inference of ultimate fact as to adverse possession that controls the case." The law of the case is then discussed with the result, as we understand it, that plaintiff failed to show continuous user by the same means for a consecutive period of twenty years. Part of the time it was by open ditches that were later filled up, and part of the time by tiling, and within the twenty years the use had been increased by new ditches draining new territory.

This method of disposing of court cases does not satisfy the call of the statute. In every case the ultimate facts in issue should be found. *Duncan v. Duncan,* 111 Wis. 75, 77, 86 N. W. 562; *Damman v. Damman,* 145 Wis. 122, 128 N. W. 1062. A statement of evidentiary facts is a mere digest of the evidence. The failure, however, to follow the statute in this respect is not necessarily reversible error. *Duncan v. Duncan, supra; Damman v. Damman, supra.* A perusal of the evidence shows that the court reached a result which the evidence would sustain if specifically found, namely, no adverse user for the required period of twenty years. But we need not affirm the judgment on this ground alone, because the undisputed evidence shows that whatever use there was was permissive all the time till defendant stopped up the drain, which act led to the commencement of this action. Plaintiff testified that he had an oral agreement with the former owner of defendant's land, one Pygall, who owned the land from 1865 till his death in 1916, when defendant succeeded to the title. The effect of such oral agreement was that plaintiff could drain surface water over Pygall's land. It further appears that plaintiff replaced a culvert on defendant's land, stating that he would do that much for enjoying the privilege of using defendant's ditches. It follows from this that the use was permissive.

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An oral license for the purpose of draining surface water across the land of another does not create an easement even though a valuable consideration is paid for it. And as long as a use under it is permissive it cannot ripen into an adverse one. *Thoemke v. Fiedler,* 91 Wis. 386, 64 N. W. 1030; *Keystone L. Co. v. Kolman,* 94 Wis. 465, 470, 69 N. W. 165; *Huber v. Stark,* 124 Wis. 359, 102 N. W. 12; *Walterman v. Norwalk,* 145 Wis. 663, 130 N. W. 479. Such license is not assignable, is revocable at will, and terminates if either party dies or the licensor deeds the land to another. *Bruley v. Garvin,* 105 Wis. 625, 81 N. W. 1038.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

PAGE WOVEN WIRE FENCE COMPANY, Respondent, vs. STAUDENMAYER and another, Appellants.

April 5—May 3, 1921.

Sales: Measure of damages upon default of seller: Special damages: Contract of sale: Parties: Contradiction by parol evidence: Amendment of answer.

1. In the absence of a showing of special damages, the measure of damages for a seller's failure to deliver goods at the time specified in the contract of sale is the difference between the contract price and the market price at the time and place when and where the contract was breached.
2. In an action against E. S. and G. S. for the purchase price of fencing where the answer of G. S. adopted the theory that E. S. acted merely as his agent in buying the fencing, in which event E. S. suffered no damage from delay in delivery, and G. S. did not and could not, on adopting the agency theory, claim damages from E. S., the court properly refused to allow an amendment to the answer of E. S. in order to assert a counterclaim for the delay.
3. An order for fencing to be shipped to G. S. and charged to E. S., by whom the order was signed, was when accepted a

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contract between the seller and E. S., whether or not there was also a contract between the seller and G. S., and could not be contradicted by showing the prior course of dealing between the parties and that as a matter of fact the seller knew and understood that the order was made by G. S. through E. S.

4. If defendants desired to defend on the ground that the contract was in fact with G. S., they should have interposed an equitable counterclaim for reformation on the ground of mutual mistake.

5. The increased cost of labor due to delay in delivery of fencing, and the loss due to the inability to use the pasture which the buyer intended to inclose, were not recoverable from the seller in the absence of evidence showing that when the contract was made both parties had knowledge of the circumstances and conditions by reason of which it was in the contemplation of the parties that a breach of the contract would result in special damages.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Contract. The defendant *E. R. Staudenmayer,* a farmer living in Caledonia, prior to April, 1915, had been the agent of and had had considerable dealings with the plaintiff, covering a period altogether of ten or twelve years. On April 8th he sent the plaintiff the following order:

"*Page Woven Wire Fence Company,* Adrian, Michigan:

"Ship to *Mr. George Staudenmayer,* 4/9/15, R. R. Station: Portage. County: Columbia, State of Wisconsin. Via C., M. & St. P. When: At once. Fence terms and discounts: Net sixty days. 360 rods woven wire field fence, X 1155—32 Lion, .5909 per rod. Charge to *E. R. Staudenmayer,* Portage, Columbia county, Wisconsin. April 8, 1915."

Accompanying this order was a letter addressed to the company and signed by *E. R. Staudenmayer,* as follows:

"Sirs: Inclosed find order for Lion fencing which I consider a very nice order. Now the situation is such that there is nothing in the order for me unless I get it through

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you, and I think I should rightly expect a commission on an order of that size. See what you can do for me."

The plaintiff acknowledged the receipt of the order by letter as follows:

"*Mr. E. R. Staudenmayer,* April 12, 1915.
"Portage, Wisconsin.

"Dear Sir: We have yours of the 8th inst. inclosing an order for 360 rods of X 1155—32 Lion fencing. We are entering this order for immediate shipment.

"We note what you say with reference to selling this order so there was no money in it for you and that you ought to have a commission. We cannot understand it that way. When we make you an offer which is our lowest wholesale price, you cannot expect a commission off of that. The price we are making is .5909 a rod. That is the very least that we can afford to manufacture this fence for. If you wish a profit, you should sell for something above the lowest wholesale price. We cannot afford to cut it."

It appears that upon the receipt of the order by the officers of the company it was entered for shipment and directions sent by the plaintiff to Monessen to have shipment made. It appears without dispute that the goods were charged upon the books of the company to *George Staudenmayer* and that an invoice of the goods was sent to *George Staudenmayer.* The principal office of the company was located at Adrian, Michigan, and its mills at Monessen, Pennsylvania. The goods were delivered by the plaintiff to the railroad company May 8, 1915. It appears that on May 10th the defendant *George Staudenmayer* wrote the plaintiff canceling the order, and on May 12th the plaintiff wrote *George Staudenmayer* as follows:

"No instructions were received from you to cancel, hence without such notification shipment was made by us in good faith. In view of this, you can readily see that the responsibility rests on you and we must therefore expect that on receipt of the goods at destination they will be taken care of by you and paid for in accordance with the terms of sale."

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It further appears that it was the intention of *George Staudenmayer* to use the fence, when received, to inclose 100 acres of pasture land. The damage claimed was $25 by reason of increased cost of labor due to delay, and the sum of $200 due to the inability to use the pasture which the fence was designed to inclose. Payment having been refused, this action was originally brought against *E. R. Staudenmayer* to recover the purchase price of the 360 rods of fencing. *George Staudenmayer* was subsequently made a party. On the part of the defendants it was claimed that the contract was made with *George Staudenmayer,* and the defendant *George Staudenmayer* counterclaimed for damages.

The case was submitted to the jury on a special verdict. The jury disagreed and was discharged. The plaintiff then moved for judgment upon the pleadings and undisputed evidence. The motion was granted and judgment was entered against *E. R. Staudenmayer* in the sum of $378.11, from which judgment the defendants appeal.

Frank R. Bentley of Baraboo, for the appellants.

For the respondent there was a brief by *E. S. Baker,* attorney, and *H. E. Andrews,* of counsel, both of Portage; and the cause was argued orally by *Mr. Andrews.*

ROSENBERRY, J. Ten assignments of error are made in relation to the admission and rejection of testimony for or against the plaintiff. Most of these objections become immaterial and are disposed of by the disposition of the major questions raised upon the record. At the close of the testimony *E. R. Staudenmayer* asked leave to amend his answer, setting up a counterclaim for damages for delay in shipment of the goods and for breach of contract on the part of the plaintiff for failure to ship in accordance with the terms of the contract. This is assigned as error. It was not shown that *E. R. Staudenmayer* suffered any damages by reason

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of the delay in shipment. The measure of damages in a case of the failure of the seller to deliver the goods at the time specified in the contract is the difference between the contract price and the market price of the goods at the time and place when and where the contract is breached. *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Foss v. Heineman,* 144 Wis. 146, 128 N. W. 881; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119. There was no evidence in the case showing that in this respect *E. R. Staudenmayer* had suffered any damages whatsoever. *George Staudenmayer* made no claim against *E. R. Staudenmayer* for special damages growing out of their relationship. The allegations made in the answer of *George Staudenmayer* did not permit of such a claim on his part against *E. R. Staudenmayer,* who, according to the theory adopted in the answer, merely acted as the agent of *George Staudenmayer.* Therefore the trial court was right in refusing to permit the amendment to the answer of the defendant *E. R. Staudenmayer.*

It appears from the pleadings that the defendants rested their case upon the allegation that the contract for the sale and delivery of the goods was a contract between *George Staudenmayer* and the plaintiff, and chose to stand or fall by that allegation. The undisputed facts show, as stated, that the order for the goods was made and signed by *E. R. Staudenmayer* and that by the terms of the order the goods were to be charged to *E. R. Staudenmayer.* The acceptance of this order by the plaintiff made a contract between *E. R. Staudenmayer* and the plaintiff and not between the plaintiff and *George Staudenmayer.* Most of the assignments of error as to the admission or rejection of testimony relate to evidence which was offered to show that prior to this time there had been an established course of dealing between the parties and that, as a matter of fact, the plaintiff knew and understood that the order was made by *George Staudenmayer* through *E. R. Staudenmayer.* An allegation of that

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kind involved a contradiction of the written order, and no principle of law is more elementary or better established than that a written contract may not be contradicted by oral evidence in the absence of an allegation of mistake or fraud. The defendant *E. R. Staudenmayer* sought no reformation of the contract, made no allegation of mistake upon his part, and there is no evidence in the record which would support a finding of mutual mistake. Whether or not there was a contract between *George Staudenmayer* and the plaintiff, it is too plain to require argument that the writings upon their face made a contract between the plaintiff and *E. R. Staudenmayer,* and the trial court correctly so held.

If the defendants desire to defend upon the ground that the contract was in fact made with *George Staudenmayer,* they should have interposed an equitable counterclaim and asked that the contract be reformed on the ground of mutual mistake. That would have presented an equitable issue triable by the court. Instead the defendants chose to proceed to trial before a jury upon a contested question of fact, and the undisputed written evidence shows that the contract as made was a contract between the plaintiff and *E. R. Staudenmayer* and not a contract between plaintiff and *George Staudenmayer.*

In order to sustain the claim of the defendants that they were entitled to recover special damages, evidence should have been offered showing that at the time of the inception of the contract both the plaintiff and defendants had knowledge of the circumstances and conditions by reason of which it would be in contemplation of both parties that a breach of the contract by the plaintiff would result in special damages. Evidence of that sort was not forthcoming. Upon the pleadings and the undisputed evidence the trial court correctly held that the defendant *E. R. Staudenmayer* was liable to the plaintiff for the value of the goods delivered.

By the Court.—Judgment affirmed.

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SCHNETZKY, Appellant, vs. ZANTO, Respondent.

April 5—May 3, 1921.

Physicians and surgeons: Malpractice: Examination of witnesses: Hypothetical questions: Including facts not in evidence: Prejudicial error.

In an action by a physician for medical services rendered defendant and his wife wherein defendant counterclaimed for damages for plaintiff's alleged negligence in treating the wife after childbirth, hypothetical questions to medical witnesses by defendant's counsel, embracing as an element the existence of pus in the uterus, constituted prejudicial error, in the absence of evidence as to the existence and nature of the pus.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The plaintiff sued in justice's court for his medical services rendered to defendant and his wife. Defendant counterclaimed for damages on account of plaintiff's alleged negligence in treating defendant's wife. On appeal to the circuit court the case was tried anew and the jury found for the defendant.

On March 5, 1919, while attending defendant, plaintiff was employed to take care of defendant's wife, who was delivered of a child on the same evening. For several days thereafter plaintiff attended both husband and wife. According to his testimony he detected symptoms of pneumonia in the wife on March 9th, and on the 10th began a course of treatment for such disease and continued such until March 13th and treated her for no other ailment during that time. At defendant's request, on March 11th Dr. Senn was called in consultation. He testifies that she was then suffering from a critical stage of pneumonia, that he made a manual examination of and found that there was no trouble with the uterus.

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On March 13th plaintiff was discharged and one Dr. Berwick called. Dr. Berwick testified that at his first visit he found defendant's wife suffering from septic or blood poisoning, with a very high temperature caused by such condition. That the source of such trouble was in the uterus. That the condition of the uterus at that time was such that it was dangerous to attempt to then clean it out. That at such time, March 13th, Mrs. Zanto had no pneumonia and there were present no indications that she had recently been so afflicted. That four days afterwards he flushed and cleared out the uterus; that in the strongly odorous fluid discharge that came at that time, in quantity approximating a pint, he found a portion of the placenta or afterbirth about the size of a pigeon's egg. That he could tell definitely that such was a piece of the placenta, rather than a blood clot, by an ocular examination. That he then established a gauze drainage from the uterus. That in his judgment an inspection of the placenta immediately after the delivery would have disclosed that a substantial part thereof had remained in the uterus and that proper medical practice required that it should have been removed forthwith. That the critical condition in which he found Mrs. Zanto and from which it took considerable time for her to recover was the direct and probable result of the failure to remove such portion of the placenta. He also testified that at the time of such discharge from the uterus there was no pus. There is no testimony in the record which tends to qualify or contradict this statement as to the absence of pus in the discharge.

A number of physicians were called by each side as experts. As a part of the direct examination by defendant's counsel of the first of such witnesses and who was called on defendant's behalf, questions were asked based upon the assumption of the finding of a piece of afterbirth as described by Dr. Berwick. Dr. Fortner, such first witness, testified

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that its remaining there would at least produce absorption and very probably infection; that if infection was produced it would cause septic or blood poisoning. The question was then asked: "State whether or not it would likely produce pus formation." This was objected to as leading, the court then saying:

"We think it is leading. You cannot tell, Doctor, the usual result of leaving the afterbirth, portions of it? . . .

"Witness: It depends upon the type of infection present whether there is pus present or not, streptococcic; one type of infection doesn't cause pus, very little if any; other types of infection do cause pus, than a staphylococcic infection there would be less pus, so it depends upon the type of infection."

A hypothetical question was then put to the witness in which was included the finding of such a piece of placenta eleven days after the birth of the child; that the womb gave away pus in an amount equal to half a pint, and a temperature that rose from 104 to 106 during the period of five to seventeen days after the birth. This was objected to "because the facts are not proven, are not the same as the facts in the case." The court said: "I think that is true in some respects; for instance, you said that the fluid was not all pus." Defendant's counsel then changed the question so as to make it *blood and pus,* and the court ruled that the witness might answer. (There was no further or more specific objection then or afterwards made during the trial on the inclusion, in the hypothetical questions, of the existence of pus.) The witness then stated that the existence of such a piece of afterbirth with blood and pus formation found in the uterus would be sufficient cause to produce a temperature that would rise anywhere from 104 to 106.

The existence of pus was made a part of the hypothetical questions by defendant's counsel in his examination of all of the medical experts save one, Dr. Baldwin.

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All the medical witnesses substantially agreed that an ocular examination of the placenta removed within a few moments after the delivery of the child, as appears happened in this case, would be sufficient to detect whether or not a remnant of such placenta had remained in the uterus. The testimony differed as to whether it was usual and proper practice, in case such examination disclosed that a portion of the placenta did remain, to forthwith, by the use of the hand or some instrument, remove the same, and whether an ocular examination alone would be sufficient to definitely determine whether the substance found in the discharge on March 17th was a fragment of the placenta or a blood clot and as to the advisability of setting up such a gauze drainage as was done by Dr. Berwick.

The plaintiff testified that he did examine the afterbirth and found that it was intact. He was corroborated on both of these points by the midwife in attendance, and, as to the fact that he did make some examination of it, by the defendant. From the judgment for defendant plaintiff has appealed.

For the appellant there was a brief by *Lehner & Lehner* of Oconto Falls, attorneys, and *R. L. Morse* of Fond du Lac, of counsel; and the cause was argued orally by *Philip Lehner* of Princeton.

For the respondent there was a brief by *M. J. Paul* of Berlin and *E. F. Kileen* of Wautoma, and oral argument by *Mr. Kileen* and by *Mr. T. W. Brazeau* of Wisconsin Rapids.

ESCHWEILER, J. Although Dr. Berwick testified directly that there was no pus in the discharge coming from Mrs. Zanto's uterus some eleven days after the birth of the child and in which was found, as he claimed, an overlooked portion of the placenta, yet it is quite apparent from an inspection of the record that through a mistake which could easily arise in the trial of such a lawsuit the court and

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counsel on both sides seemed to have assumed that there was testimony which would warrant the including as an important feature of the hypothetical question asked of the medical witnesses the existence of pus in such discharge. Although at one stage of the case the court called attention to the fact that there was no evidence as to the nature of the pus, yet nowhere was there direct or specific challenge made as to such element being improperly included in the hypothetical questions. While it is true that plaintiff's counsel, in his objection as set forth in the statement of facts, *supra,* did not specify such feature as one of the grounds of his objection, neither was he requested by the opposing counsel or by the court to be more specific with his objections.

From the answers of some of the physicians it was evident that in their judgment the presence or absence of pus, or at least the question as to the variety of pus assumed to be present, were elements of considerable importance in determining the substantial question at issue between the parties, that is, whether the condition of high temperature and chills which Mrs. Zanto had from the fifth day after the delivery was naturally and directly attributable to the remaining of a portion of the placenta in the uterus as claimed by defendant, or to some other cause, as pneumonia, as asserted by plaintiff.

While from the medical standpoint the very general term "pus" may include innocuous as well as noxious varieties of exudations, yet to a body of laymen such as make up the jury, the term as it was used in the questions propounded to the medical experts, taken especially in connection with the testimony as to the strong odor arising from the discharge, naturally conveys a strong impression that there was existing a substantial putrefaction of something within the uterus and presumably that which was described by Dr. Berwick as being a portion of the placenta and which defendant claimed had been overlooked by plaintiff in his examination of the afterbirth.

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Although, so far as we can discover in the record, this feature of the trial was not called to the attention of the trial court, nevertheless it is suggested and discussed in appellant's brief here. A consideration of the entire testimony satisfies us that this reiterated inclusion of and emphasis upon this element of pus as being present in the discharge must have influenced the jury in a substantial degree in arriving at the verdict which they rendered. We are also convinced that the error was of such a nature that it must be declared to have caused a substantial prejudicial error for which the plaintiff should be granted the relief of a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

ROWLANDS, Respondent, vs. ELECTRICAL CONSTRUCTION COMPANY, Appellant.

April 6—May 3, 1921.

Sales: Executory contract to sell: Reservation of option to rescind: Bailment: Delivery of bailed goods to one claiming title: Estoppel: Conversion.

1. An instrument whereby a person who was to receive an automobile as part payment on lands agreed, in case the sale of the lands was consummated, to accept a sum of money from her broker as a release from all claims and to transfer the automobile to the broker, is not a bill of sale, but an executory contract of sale, in view of a clause in the agreement which provided that in case the automobile was not transferred to the broker the money must be refunded.
2. The executory contract of sale, reserving an option to rescind, made before the seller acquired title to the car, is rescinded by the seller making a bill of sale to the plaintiff after acquiring title to the car.
3. The fact that plaintiff was the agent of C. in making a conditional contract to sell an automobile to F. is not available to defendant, with whom plaintiff, after subsequently receiving a bill of sale of the car from C., stored it, as an

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estoppel against plaintiff claiming title to the car, in a suit for its conversion by delivery to F.

4. The defendant, who knew that plaintiff claimed title to the car, was liable for conversion in delivering it to another claiming title, though acting in good faith.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action for damages for conversion of an automobile, or for failure to deliver the same in accordance with a contract of bailment. On trial by the court without a jury plaintiff had judgment. Defendant appeals.

One May Cheney owned a parcel of land near Racine and had engaged plaintiff as her agent to make a sale thereof. Morris Feldman was a tobacco dealer from whom the said Mrs. Cheney had purchased some supplies and who claimed that she owed him certain sums of money. This was denied by her. The amount of these debts, if any, did not appear. Feldman knew of her desire to sell the land and procured a prospective purchaser in the person of one John Chovan. Chovan was willing to give for the land $2,200 cash and a second-hand Mitchell automobile which he then had in storage for a consideration in defendant's public garage in Racine. Defendant had a chattel mortgage on the machine for part of the purchase price and had certain other charges on account of said machine, the unpaid notes and charges totaling about $186.62.

On January 3, 1918, all these parties except defendant met in plaintiff's office to arrange the sale, and an agreement was signed by Mrs. Cheney and Chovan for the sale of the land for $2,700 including the Mitchell automobile, and the balance, $2,200, to be paid in ten days upon showing good title and tendering a deed.

Feldman claimed that there had been an agreement between him and Mrs. Cheney by which he was to have the car for a consideration of $300 paid to her. She denied having made such an agreement. According to plaintiff's

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testimony and that of Mrs. Cheney, she discovered at this time that the machine was a Mitchell instead of a Ford, as she claimed Feldman had represented to her, and was therefore of greater value. There was considerable testimony that on account of this she said she would not let Feldman have the machine. The latter offered to pay more, $375, and an agreement was drawn up to that effect. Mrs. Cheney, however, refused to sign this agreement until the addition of the final sentence which, it is claimed by plaintiff, was added for the purpose and with the intent of reserving to Mrs. Cheney the option of withholding the machine from Feldman. The plaintiff and Mrs. Cheney testified to this effect, and plaintiff's stenographer supported it to the extent of testifying that Mrs. Cheney said Feldman could not have the car because he had misrepresented it. Feldman, called by defendant, gave no testimony positively denying it. The agreement, as it was finally signed, is as follows:

"Racine, Wis., January 3, 1918.

"This agreement by and between May Cheney of Milwaukee and M. Feldman, also of Milwaukee, is to the effect that if a certain agreement for the sale of lot 1, block 1, Ives, by said M. Feldman to one John Chovan is consummated and the said May Cheney receives in addition to a check of $375 and all account that the said M. Feldman has against the said May Cheney of any nature, and further $2,200 in cash and one Mitchell automobile, then the said May Cheney agrees to transfer to said M. Feldman the automobile that she receives as part payment for said lot 1, block 1, Ives, the receipt of payment for the automobile is hereby acknowledged if sale is consummated. If machine is not transferred to said Feldman the money paid must be refunded. MAY × CHENEY."

Feldman delivered his check for $375 to plaintiff as agent for Mrs. Cheney. There is evidence that plaintiff tendered it back before Feldman left his office but that the tender was refused. Plaintiff testified that he took the check to his bank to have inquiry made whether it was good, but that

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through a misunderstanding the bank secured payment of it. It is indorsed in blank by plaintiff. Plaintiff testified that on at least two occasions since he has offered to return the money to Feldman but that his offers were rejected.

On January 4th Chovan paid the $2,200 cash and gave Mrs. Cheney a bill of sale of the automobile. Mrs. Cheney thereupon gave a bill of sale thereto to plaintiff, for which he paid $700. Chovan and plaintiff, with perhaps Feldman, went to defendant's garage, identified the machine, and plaintiff arranged with defendant's agents and president for the continued storage of the machine for plaintiff at the rate of $5 per month, plaintiff also agreeing to see that the charges against the car were paid.

On January 4th Feldman started suit against Mrs. Cheney for $400 damages upon contract and garnished the present defendant. The defendant's president, in the office of plaintiff's attorney, made an affidavit in answer to the garnishee summons to the effect that prior to the service of such summons it had been informed that the machine had been transferred from Chovan to Cheney, and from Cheney to the present plaintiff.

Thereafter, Feldman exhibited to defendant the contract with Mrs. Cheney, hereinbefore set forth, and the canceled check, paid the balance of the chattel mortgage debt and other charges against the car in the total sum of $186.62, and secured possession of the machine from defendant.

The trial judge, in a so-called decision signed by him, stated that the title to the automobile did not pass from May Cheney to Feldman January 3, 1918; that title did pass to plaintiff by bill of sale of January 4, 1918; that there was a valid contract of bailment between plaintiff and defendant known to its officers; that plaintiff is not chargeable with fraudulent conduct, active or constructive, and is not estopped from setting up his claim; and that defendant misconceived its duties and obligations in delivering the

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automobile to Feldman. The trial court found as facts that defendant was engaged in the storage of automobiles; that on or about January 4, 1918, the plaintiff was owner and entitled to the possession of the automobile in question; that on or about said date plaintiff made an agreement with defendant whereby defendant agreed to store plaintiff's said automobile for $5 per month; that defendant in violation of said agreement delivered the automobile to Feldman instead of to plaintiff; that Feldman was not the owner thereof nor entitled to possession; and that the delivery to him was in breach of the duty and obligation to plaintiff; and that the value was $700. Judgment was accordingly entered in favor of plaintiff for $700 and costs.

For the appellant there was a brief by *Storms & Foley,* attorneys, and *William W. Storms,* of counsel, all of Racine; and the cause was argued orally by *William W. Storms.*

For the respondent there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

JONES, J. It is claimed by the appellant that title to the automobile passed to Feldman on January 3d by virtue of the memorandum signed by Mrs. Cheney and payment of $375; that the bill of sale to respondent on the next day passed no title to him because Mrs. Cheney had no title to convey; that there was no contract of bailment because he had no title on that day; and that appellant delivered the car to the true owner in good faith, and that the memorandum executed on January 3d and the canceled check and the failure of respondent to show to appellant his bill of sale afforded sufficient evidence to warrant the delivery.

The memorandum executed on January 3d is not a bill of sale. At that time Mrs. Cheney had no title to the car and the document was only an executory contract to sell. The last clause, "if the machine is not transferred to said Feldman the money must be refunded," clearly shows that there

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was not even an unconditional contract to sell the car. The oral testimony shows that this clause was regarded as important by Mrs. Cheney, and we construe it as a reservation on her part of the right to pay back the money and keep the car. In view of the testimony that she had been misled by Feldman as to the value of the car, and had been told that it was a Ford when in fact it was a Mitchell car, we cannot say that she was not justified in exercising the option she reserved. After acquiring title on the following day, her bill of sale to the plaintiff rescinded the agreement with Feldman so far as related to the car, and, as the trial court found, passed title to the respondent. *Shores L. Co. v. Claney,* 102 Wis. 235, 78 N. W. 451.

Counsel for appellant criticise the conduct of respondent and argue that since he drafted the memorandum and accepted the money from Feldman, being at the same time agent of Mrs. Cheney, he is estopped from claiming title to the car. Feldman is not a party to the suit, and it is difficult to see that any of these facts are available as an estoppel on behalf of appellant. Moreover, there is evidence that respondent had some reason to believe that Feldman had attempted to take advantage of Mrs. Cheney, for whom respondent was acting as agent. The testimony is quite susceptible of the construction that respondent in the whole transaction was seeking to protect his principal. The trial judge probably so believed, and in the decision found that plaintiff was not chargeable with fraudulent conduct and was not estopped.

The appellant may have acted in good faith in delivering the car to Feldman, but it certainly acted very rashly in so doing. There is a clear preponderance of proof that it knew that respondent claimed to be the owner of the car, and, as the trial court found, that it agreed as bailee to deliver it to respondent. It was not necessary in making this contract of bailment that respondent should produce and show to

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appellant the evidence of his title, and no such evidence was called for. Since we hold that respondent was the owner of the car when the contract of bailment was made, it follows that appellant disregarded its contract in making delivery to Feldman, and it becomes unnecessary to discuss the question when delivery may be made by a bailee to a third person having paramount title.

By the Court.—Judgment affirmed.

MURNANE, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

April 7—May 3, 1921.

Railroads: Negligence: Trainman in dangerous position: Discovery by train and engine crews: Unexpected act of trainman: Death: Proximate cause.

1. Where a brakeman, after lying sick or asleep on top of a car while it was in motion, arose and walked off the car after it had stopped, the failure of defendant's train crew, when informed of his position, to stop the car at once and go to his rescue was not the proximate cause of his death, decedent's action being of a nature not to be anticipated in the exercise of reasonable care and foresight.
2. Where the engineer of the train, immediately upon being informed of the brakeman's dangerous position on top of the car, directed his fireman to look for him, and before the fireman reached him and after the train had stopped decedent arose and walked off the car, there was no basis for the finding of the jury that the engineer was negligent in operating the train after being informed of the brakeman's position.
3. The evidence is *held* sufficient to sustain the trial court in changing the special verdict so as to find that the brakeman's fall from the car was not caused by the motion thereof.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought under the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149) by

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plaintiff as administratrix against the defendant railway company to recover damages for the death of her husband.

James Murnane was fifty-two years of age at the time of his death. He had been employed by the defendant for more than twenty-five years, most of this time as a brakeman. Lake station, the scene of the accident which resulted in his death, is located on defendant's railroad about seven miles south of Milwaukee. At this station there are two main tracks, extending generally in a northerly and southerly direction. The easterly main-line track is commonly known as the west-bound track and carries the trains going north. The westerly main line is commonly known as the east-bound track and carries the trains going south. The station building is located a few feet east of the west-bound track; the tower building is about twenty-five feet north of the station building. There is a semaphore or "west-bound home signal" at a point 730 feet south of this tower on the west-bound main track; and at a point 631 feet north of the tower there is a semaphore or "east-bound home signal" on the east-bound main track. At this station there are also two switching yards, one known as the north yard, the other as the south yard. The south switching yard begins about 730 feet south of the tower and extends southerly from that point and consists of a series of switch tracks parallel and westerly of the main-line tracks. The north switching yard begins at a point about 630 feet north of the tower and consists of a series of parallel switch tracks east of the main-line tracks and extends northerly from that point. South of the tower there are three crossings over the tracks and switch yards, the first being known as College avenue, 175 feet south of the tower; the next, known as the "Section" or the "First Farmer's Crossing," is 1,082 feet south of the tower; and the third, known as "Farmer's Crossing" or "Second Farmer's Crossing," is 1,590 feet south of the tower. There are also at this station and adjacent to and connected with

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the main tracks and switching yards, passing tracks, cross-over tracks, and many switches for the purpose of switching and controlling the movement of the trains.

The day of his death Murnane was working as head brakeman on an extra west-bound freight train which left Galewood, Illinois, on the night of October 31, 1915, bound for Milwaukee, Wisconsin. When the train reached Lake station it was composed of two engines at the head of the train and thirty-six freight cars and a caboose at the rear. It arrived at Lake station at 12:26 a. m. on the morning of November 1, 1915. The accident occurred at 12:55 a. m. of that morning.

When the freight train arrived at Lake station it first stopped south of the tower. As there were a number of cars next to the engine which were to be "set out" in the south or east yards, the rear brakeman, a man by the name of Horton, cut the train, leaving seventeen cars attached to the engines. He then gave a signal to pull north, and the remaining nineteen cars were left standing south of the semaphore on the west-bound main line. The locomotives with the seventeen cars attached then pulled north, passed the tower into the north yards, and stopped with the rear end of the seventeen cars about opposite the semaphore or east-bound home signal north of the tower. As the train pulled north past the tower, Willson, the tower man, saw Murnane, sick or asleep, lying upon the top of a refrigerator box car about the fifth one back from the engine. The train waited in the north yards eight to twelve minutes for some one to give a signal to back. It was Murnane's duty to give this signal and to bring the train back into the south yard. After the train had been cut and pulled north past the tower Conductor O'Rourke went over to the farmer's crossing to the south yards to No. 6 switch track upon which some of the cars were to be set out. There was a coal car standing upon this track just north of that crossing, but there was still sufficient

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room on the track south of the crossing to hold another car. O'Rourke remained at this point until the train upon which Murnane was lying backed in on No. 6 switch track to where O'Rourke was. Horton, as the train was pulling north, had lined up some switches in the south yard; he waited a few minutes for the train to back, and as there was no movement from the train he walked up to the tower to find out what was the matter. The tower man then told him that Murnane was lying on top of one of the cars. Horton asked the tower man if it was all right to back up, "as to whether it was safe," and the tower man replied that it was all right. Horton signaled the train to back, and the train then backed south past the tower from the north yards and over the cross-over into the south yards. As the rear end of the train reached the tower Horton swung onto the train and rode back into the south yard to the second farmer's crossing, continuing to give signals for the switching.

As the train was being switched south back past the tower, Willson, the tower man, again saw Murnane lying on the top of the box car. He became alarmed, and as the engines passed the tower he called to the engineers and informed them of Murnane's position. The train continued to back in on the No. 6 switch track in the south yards as far as it could go and as far as they wanted to go against the coal car, pushing it over the crossing. When informed of Murnane's condition Engineer Christoph did not stop the train, but told his fireman, Kramer, to get a torch and go look for Murnane. Kramer testified that he walked back on top of the box cars while the train was moving, but the train stopped before he got on the fourth car, and that when he was on the fourth car he saw Murnane get up and walk off the car backwards. He fell to the earth, causing his death. The place where Murnane fell was about 1,060 feet south of the tower. It was about 2,200 feet from the point in the north yards from which the car had been started. Willson,

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the tower man, testified that he saw Murnane arise from his lying position on the car, take his lantern, walk towards the end of the car and fall off. Both Kramer and Willson testify that the train had come to a stop from one and one-half to two minutes before Murnane got up, and that he remained standing up to the time he fell off the car.

Plaintiff claims that it was the duty of the tower man and of the other employees of the defendant company to exercise care and caution for the safety of fellow employees, and that it was due to their negligence in this respect that the accident to Murnane occurred, resulting in his death.

The case was tried before the court and a jury. At the close of the evidence a motion was made by defendant for a directed verdict. This was overruled. By a special verdict the jury found: (1) That Murnane's fall from the car was caused by a motion thereof; (2) that the engineer who controlled the movement of the train was guilty of negligence in operating and moving the train after learning that Murnane was lying on the car; (3) that Murnane's death was caused in whole or in part by such negligence of the engineer; (4) that Murnane was not guilty of any contributory negligence; (5) that the pecuniary loss of plaintiff was $5,000, and that the pecuniary loss of the three children was $2,000.

A motion by plaintiff for judgment in conformity with the verdict was denied. The court entered an order changing the answer of the jury to the first and second questions from "Yes" to "No." Judgment was granted upon the verdict as changed in favor of the defendant, and plaintiff's complaint was dismissed with costs. From this judgment appeal is taken.

For the appellant there was a brief by *William L. Tibbs* and *Willis E. Lang,* attorneys, and *Daniel W. Sullivan,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Tibbs.*

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For the respondent there was a brief by *H. J. Killilea* and *Rodger M. Trump,* both of Milwaukee, and oral argument by *Mr. Trump.*

SIEBECKER, C. J. The trial court, in passing on the question of upholding the jury's finding that Murnane's fall from the car was caused by a motion of the car, declared:

"Every witness who was in a position to observe Murnane when he began to arise from a lying position on the car from which he fell, testified that the car had come to a standstill before he began to arise."

An examination of the evidence convinces us that the trial court's conclusion on this point is correct. True, there are some discrepancies in the different statements made by Willson, but a consideration of them in connection with his explanations and the other credible evidence and physical facts established in the case clearly shows that he did observe the movement of the part of the train which was being backed onto track 6, and that he saw that it had come to a stop before he observed Murnane moving with a lantern to the side of the car from which he fell. The claim that on account of the darkness of the night Murnane could not be seen by Willson at such a distance, about 1,080 feet, is not sustained. It is shown that another engine illuminated the track, and the evidence does not establish that Murnane's movement in arising and carrying a lantern in his hand would not have been visible to Willson without the aid of the other engine light. The testimony of the fireman, Kramer, is positive and clear that when he was on the car next in front of the one Murnane was on he saw Murnane get up and start walking on the car away from him; that Murnane deviated to the side of the car and fell off. This witness is also clear and positive in his statement that the train had come to a full stop before Murnane got up.

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The facts and circumstances showing the position of the train and its location when Murnane fell sustain the inference that it was then standing still. We are of the opinion that the record clearly sustains the trial court in holding that the first question must be answered in the negative as a matter of law. Upon this state of the facts, can it be said that Murnane's fall and his death were proximately caused in whole or in part by a motion of the train? The trial court held that, under the facts and circumstances shown, any movement of the train before it came to a standstill at the time Murnane got up can have no proximate causal relation to his falling off the car. It is self-evident that since the train stood still when he arose and while he walked off the car, no motion of the train could operate to cause his fall. It is, however, suggested that the failure to stop the cars immediately when Willson informed the train crew of Murnane's position on the car and their failure then to go to his rescue may have produced the accident in whole or in part and hence make defendant liable under the federal act. The infirmity of this claim consists in the fact that the causal relation of Murnane's fall and the omission of the train crew to do the things suggested is the barest speculation. How can the getting up of Murnane and his walking off the car be in any sense the result of not having stopped to look him up sooner or the failure to send Kramer to find him? The actions of Murnane that led to his fall and consequent death were of a nature not to be anticipated in the exercise of reasonable care and foresight. They were attributable to his unexpected conduct, for which defendant was in no way responsible, and hence defendant in no legal sense can be held to have proximately caused his death, in whole or in part.

The evidence shows that when the engineer who had control of the train in backing in on track 6 was informed by

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Willson of Murnane's position on the top of the car he immediately directed the fireman, Kramer, to get a torch and look for him. This Kramer immediately proceeded to do in the manner stated in the foregoing statement, but before he reached him and while the train was standing still Murnane got up, walked off the car, and fell in the manner indicated. Under these circumstances there is no basis for the finding that the engineer was guilty of negligence in operating the train after being informed of Murnane's position on the car, or that the engineer's negligence in whole or in part caused Murnane's death.

By the Court.—The judgment appealed from is affirmed.

WILL OF MEYER: FLITTNER, Executrix, Appellant, vs. GRAF and another, Respondents.

April 7—May 3, 1921.

Wills: Cancellation of debt as bequest: Subsequent change in form of debt: Effect.

Where testatrix entered into a contract with her daughter and son-in-law to sell them a lot on monthly instalments, and later executed her will bequeathing said lot to them absolutely on her death and directing that no further payment be required on said contract, and thereafter she deeded the lot to them and took a mortgage to secure the unpaid balance, the deed and mortgage did not operate as a revocation of the will, but the will operated upon the mortgage indebtedness, made a bequest of it, and vested absolute title to the lot in the daughter and her husband on the death of testatrix.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to construe a will. In 1906 testatrix entered into a land contract with her daughter and her son-in-law for the sale of a certain lot. Payments of $22 per month were

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thereafter made as provided for in the contract up to March 7, 1917, when she executed a deed to them and took a mortgage for the balance due with interest at five per cent. On March 8, 1916, she executed her will, the fifth paragraph of which read:

"I herewith give, devise and bequeath unto my daughter, *Adela Graf,* and her husband, *Charles Graf,* in jointure, the following described real estate [describing the lot], which real estate I have heretofore sold under land contract unto my said daughter and her husband, and I direct that no further payment shall be required from them on said land contract, and the title to said real estate shall be vested in said parties absolutely upon my death."

Testatrix died March 12, 1917.

The trial court found that the execution of the deed and mortgage on March 7, 1917, did not revoke the clause of the will quoted and that the mortgage was canceled by virtue of the bequest in the will and the grantees took absolute title to the lot.

From a judgment entered accordingly the executrix, *Wilhelmine Flittner,* a sister of *Adela Graf,* appealed.

George J. Graebner of Milwaukee, for the appellant.

Emil J. Ludwig of Milwaukee, for the respondents.

VINJE, J. The evidence is lacking as to the age of testatrix and is indefinite as to the total value of the estate left by her. She specifically directed that a grandson and two of her sons should take nothing under the will. To the executrix she devised a lot in Milwaukee and she also made her the residuary legatee. Her household furniture and wearing apparel she gave in equal parts to her two daughters named. It appears that she was on good terms with both daughters and with her son-in-law, *Charles Graf,* who visited her frequently in her last sickness. She was cared for by the executrix, who lived with her, and from the nature and duration of her sickness it is probable that she did not

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expect to recover at the time she executed the deed, though she was then not considered *in extremis*.

It is the contention of the executrix that the execution of the deed and the taking of a mortgage to secure the unpaid balance operated as a revocation of the fifth paragraph of the will because, since the latter takes effect at death only, the subject matter of the paragraph had been so dealt with between the execution of the will and her death that there was nothing upon which the will could operate when it took effect.

We regard this contention ill-founded. So far as paragraph 5 is concerned the dominant purpose of the testatrix was (a) to pass title to the lot to her daughter and her husband, (b) to bequeath to them whatever sum was due on the land contract at the time of her death, and (c) to retain the value of the contract during her life. By the deed and mortgage she conveyed the title, but she left unchanged the bequest of what was due, and she retained the value of the new contract during her life. The will operated upon the indebtedness evidenced by the mortgage and made a bequest of it. The fact that it was secured by a mortgage instead of by a land contract is quite immaterial. As a prudent person, she desired to have both the principal and interest of the indebtedness for her use if necessary. When she no longer needed either, that is, upon her death, both principal and interest then due were to become a bequest to the purchasers. This construction we deem is required by the transactions themselves, and harmonizes with the situation and relation of testatrix to those she intended to be the objects of her bounty. It is not probable that she intended to be less generous to the purchasers, her daughter and son-in-law, by changing from a land contract to a deed and mortgage. Indeed the contrary is more probable. She wanted to vest them with title before she died so there could

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be no failure of title in them. She no doubt believed the will according to its provisions would cancel the debt when she died. Had she thought differently the will would have been changed to correspond with the intended change in the bequest to them.

By the Court.—Judgment affirmed.

SAVICH, Respondent, vs. HINES, Director General of Railroads, Appellant.

April 7—May 3, 1921.

Pleading: Matter pleaded and admitted: Effect on case: Amendment of pleading: Admitted matter as evidence: Explanation or qualification: Railroads: Interstate commerce: Sufficiency of evidence.

1. Where a material fact is alleged in the complaint and admitted in the answer it becomes a verity in the case, evidence in respect thereto being immaterial; and a party is concluded by such an allegation as long as the pleadings remain unamended. Even after amendment of the pleading, the admission, although not conclusive, is evidence of the fact admitted, but may be explained or qualified, and more especially where the admission is denied in the pleading of the opposite party.
2. In an action by an employee of a railroad who was injured while carrying a drawbar in the yards, it is *held* that the finding of the trial court that the plaintiff was engaged in interstate commerce is against the clear preponderance and great weight of the evidence, taken in connection with an allegation in the complaint that plaintiff was carrying the drawbar from one pile to another in the yards, as against his testimony at the trial that he was carrying it to a car destined for an interstate journey.

[3. Whether the gathering of scrap by a railroad company to transport by its own agencies, for its own purposes, to another point on its system, constitutes interstate commerce, not decided.]

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APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The complaint alleged, in substance, that while the plaintiff was in the employ of the defendant company in interstate commerce on October 18, 1918, and assisting in carrying its drawbars from one pile to another in defendant's yards in the city of Milwaukee, the plaintiff received an injury to his foot when one of the drawbars he was carrying was permitted to fall, violently striking his foot. Three grounds of negligence were alleged: First, negligence of the defendant's employees in causing and permitting the drawbar to fall without notice or warning to the plaintiff; second, incompetency of plaintiff's fellow-servants; and third, failure to furnish plaintiff a safe place to work. Upon the trial the complaint was amended and a further ground of negligence alleged that the defendant was negligent in not furnishing a sufficient number of men. The answer admitted an injury to the plaintiff while engaged in carrying a drawbar from one place to another, admitted that the *Director General of Railroads* was in charge of and operating the transportation system of the Chicago & Northwestern Railway, and as to the other allegations of the complaint there was a general denial. The answer set up affirmatively that defendant had specifically in writing voluntarily accepted the provisions of the workmen's compensation law of Wisconsin and that the rights and liabilities of the parties were controlled and governed thereby. The case was tried before the court, findings were made sustaining the contentions of the plaintiff, and judgment was entered accordingly, from which the defendant appeals.

R. N. Van Doren of Milwaukee, for the appellant.

For the respondent there was a brief by *Ray J. Cannon* and *Frank Waldron,* attorneys, and *A. W. Richter,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Richter* and *Mr. Cannon.*

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ROSENBERRY, J. In the view that we take of the case it is necessary for us to consider but one question raised here, and that is whether or not the plaintiff was engaged in interstate commerce as found by the trial court. The court found that the plaintiff was performing work necessary to the orderly and expeditious carrying on of the interstate commerce of the defendant; that the plaintiff was ordered to carry the drawbar to a railroad car which was being loaded with company material, and that the drawbar which caused the injury was immediately placed upon a car which was being loaded with company material and was sent to Chicago, and that the car had already been designated and ticketed to be sent to Chicago, and that as soon as it was fully loaded it was sent. The undisputed evidence shows that the drawbar in question had been removed from a car, which the court refused to find was an interstate car, on a day previous. During the course of the trial the plaintiff testified that he was engaged in carrying the drawbar in question to a car to be loaded, designed for Chicago. In his complaint the plaintiff alleged that at the time of the injury he was assisting in carrying off iron drawbars from one pile to another in said yards, and this allegation was by the answer admitted. The allegation in the complaint was never withdrawn, and the pleadings therefore presented no issue as to that material fact. Where a material fact is alleged in the complaint and admitted in the answer, it becomes a verity in the case and evidence in respect thereto immaterial to the issues, there being no issue upon that matter. *Cutler v. Babcock,* 79 Wis. 484, 48 N. W. 494; *Denton v. White,* 26 Wis. 679; *Seymour v. Seymour,* 56 Wis. 314, 14 N. W. 371; *Wilson v. Groelle,* 83 Wis. 530, 53 N. W. 900; *Wanzer v. Howland,* 10 Wis. 8; *Hawkes v. Dodge Co. Mut. Ins. Co.* 11 Wis. 188; *Tollefson v. Tollefson,* 171 Wis. 149, 176 N. W. 879; 31 Cyc. 87, and cases cited in note 64. A party is by such an allegation concluded so long as the pleadings remain unamended.

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The admission, however, even after amendment, though not conclusive, is evidence of the fact admitted. *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234. Such admissions may be explained and the circumstances under which they were made may qualify an allegation contained in a pleading, more especially, however, where it is denied in the pleading of the opposite party. *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330; *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234.

A jury having been waived and the case tried before the court, and the court having made its findings upon the controverted matter, we may suppose that had an amendment of the complaint been asked it would have been granted. If we treat the complaint as amended, the question then arises whether or not the finding of the court is against the clear preponderance or great weight of the evidence. *Tilton v. J. L. Gates L. Co.* 140 Wis. 197, 121 N. W. 331; *Hintz v. Wald,* 138 Wis. 41, 119 N. W. 821. The testimony of the plaintiff given upon the trial, both as to the manner in which the injuries complained of were received and the nature of the work being performed at the time of the accident, is inconsistent with itself and indefinite and unsatisfactory when taken as a whole. When taken in connection with the solemn admission contained in his pleading and with all the other evidence in the case, including that relating to the surrounding facts and circumstances, the usual, customary, and ordinary methods of transacting the work in which the plaintiff was engaged, we are of the opinion that the finding of the trial court that the plaintiff was engaged in interstate commerce is against the clear preponderance and great weight of the evidence. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714.

If it were established that the drawbar was being carried to the car instead of to another pile, there would remain the very serious question as to whether or not, under the

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circumstances detailed in the evidence, the gathering up of scrap by a railway company to transport it by its own agencies, for its own purposes, to another point upon its system, would constitute interstate commerce. *Loverin & Browne Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *Ruck v. C., M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074. The conclusion which we have reached makes it unnecessary to determine that question in this case. The plaintiff not being engaged in interstate commerce, his rights are those prescribed by the workmen's compensation act.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

SAUER HIDE COMPANY, Respondent, vs. STEIN, Appellant.

April 7—May 3, 1921.

Sales: Formation of contract: Telegram referring to oral offer: Custom: Appeal: Service of appeal papers: Waiver of defective service.

1. Sec. 2836*a*, Stats., providing that, when an appeal is attempted to be taken in an action in which an appeal is authorized and return is duly made, respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or the jurisdiction of the appellate court unless he shall move to dismiss before taking or participating in any other proceedings, applies to attempted appeals to the supreme court.
2. Under secs. 2820, 2821, Stats., relative to the service of papers, sec. 2836*a*, relating to the waiver of objections, and sec. 3049, relating to service of notice of appeal, the respondent, by admitting service of copies of the printed case and brief and stipulating for a continuance of the hearing of an appeal, waived any right to question the jurisdiction of the court because notice of the appeal was served by mail instead of personally.

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3. In an action for breach of a contract for the sale of hides, the jury's conclusion, sustained by the civil court of Milwaukee county, that the contract contained a guaranty by the seller that not more than fifty per cent. of the hides would be of second quality, is *held* to be warranted by the evidence and the admissions in the pleadings.
4. Plaintiff offered a lot of hides to a broker at twenty-five cents a pound, and by telephone said it would guarantee their running not over fifty per cent. of No. 2's, and in answer to an offer of twenty-four and one-half cents a pound plaintiff wired that it would accept such price with all No. 2's included. The broker's prospective customer did not agree to such conditions, and the broker offered the hides to defendant, informing him of plaintiff's guaranty. Defendant accepted the hides, and the broker wired plaintiff, "Accept hides as offered." *Held* that, as the broker was not defendant's agent nor acting as broker between plaintiff and defendant when plaintiff's telegram was sent, defendant was not precluded by the telegrams from showing the offer presented to him by the broker and accepted by him.
5. In the absence of any provision to the contrary in the contract, a custom in the particular line of business permitting the buyer to treat the contract as broken if the first shipment contained more second-quality hides than agreed, and leaving it wholly at his option whether to accept subsequent shipments making up the deficiency in first-quality hides, was controlling.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The plaintiff is a wholesale dealer in hides in Pittsburgh, the defendant a dealer in Milwaukee, and Francis A. Groves a broker in hides in Chicago.

It is conceded that in the hide trade the better quality are referred to as number 1's, the lower as number 2's. A quoted price per pound for number 1's means a price one cent lower per pound for number 2's. Hides designated as long-haired are a poorer grade than the short-haired.

August 10, 1917, the plaintiff telegraphed to Groves an offer of 2,500 hides, no long-haired, at twenty-five cents per pound.

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Upon receipt of the telegram, Groves, being desirous of knowing the proportion of number 2's that would be included, telephoned to the plaintiff's president and was informed that the lot would run from thirty-five to forty per cent. of number 2's and that plaintiff would not guarantee their running not over forty per cent., but would guarantee not over fifty per cent. 2's. After communicating with one or more prospective customers not including defendant, Groves then wired plaintiff that he had an offer of twenty-four and one-half cents per pound with a guarantee that not over forty per cent. number 2's should be included.

Plaintiff replied to the effect that it would take twenty-four and one-half cents per pound for 2,500 or 3,000 hides, no long-haired hides included, but that *all 2's must be included,* and requested Groves to wire acceptance. The then prospective customer of Groves did not agree to such conditions, but such refusal was not communicated to plaintiff. On the next day, Saturday, August 11th, defendant called on Groves and was informed by him concerning the lot of hides offered by plaintiff and of the telephoned statement that the lot would not contain over thirty-five to forty per cent. 2's and was also informed of the offer that had been made by Groves's other customer.

Defendant agreed to purchase the hides and Groves wired plaintiff, "Accept hides as offered." Groves mailed on Saturday, August 11th, in the usual form, the confirmation of sale, in which he mentioned the name of defendant as buyer, the price of twenty-four and one-half cents per pound, and that the lot was to contain "not over fifty per cent. 2's," and that the buyer, the defendant, would pay Groves's commission.

On Monday, August 13th, the plaintiff's president, having before him the telegram and the letter of confirmation of August 11th, wrote Groves calling attention to its claim that confirmation did not agree with its telegram in the

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particular that the confirmation provided that the shipment was not to contain over fifty per cent. 2's, the telegram that all 2's must be included, asking for a corrected confirmation that would agree with the original offer; that plaintiff would begin to arrange the hides "I have sold to *Oscar Stein,* Milwaukee, Wis., through you" on the following Monday, the 20th, and would expect Groves's employee to be there on the 21st to begin the work of inspecting the shipment. No corrected confirmation was sent.

After receiving this letter on August 14th, Groves replied to plaintiff referring to the telephone communication and the statement therein that the plaintiff would guarantee there were not over fifty per cent. 2's in the lot and that he, Groves, had sold the goods on that representation; that Groves had written the confirmation according to the way he thought the transaction was made, but if he was wrong regarding any minor points he would make the proper adjustment. On August 15th, in reply, the plaintiff wrote Groves to the effect that at the time of the telephone communication the limitation of not over fifty per cent. 2's was made provided the hides were sold at twenty-five cents; referred to the subsequent telegram by plaintiff that they would accept the price of twenty-four and one-half cents with all 2's included, and Groves's telegram, "Accept hides as offered." The letter also stated that plaintiff was taking up this question to avoid a misunderstanding when the hides were delivered, and that unless plaintiff heard by wire they would commence preparing for shipment on the following Monday. Groves replied on August 17th saying that he could not see how the hides could run more than fifty per cent. number 2's if they were hides from plaintiff's section of the country; that all Groves wanted is what is fair and right, and that he did not anticipate any trouble with regard to this trade; that they might start on the following Monday and his employee would be there on Tuesday morning.

The work of inspection began on August 21st and on the

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following day the inspector wired Groves to the effect that the first car contained about sixty-six per cent. 2's. On the 23d, after receipt of such telegram, Groves wired the plaintiff, "Please hold hides for change in shipping instructions." Plaintiff replied: "One car hides already gone forward and draft made on *Stein,* second car almost finished." August 24th, after Groves had communicated with defendant, he telegraphed plaintiff saying that the defendant would not take over fifty per cent. 2's. Plaintiff immediately replied, "Expect you to receive hides as bought, we are willing to ship 2's over fifty per cent. elsewhere for your account, wire." Groves replied that he did not buy hides on his own account, and on the 25th telegraphed plaintiff to the effect that *Stein* had telephoned that the first car was so different from contract that he will not accept and insists upon canceling the deal.

The invoice of the first car shipped on August 23d, received by defendant about the 25th, showed on its face that the car contained about sixty-six per cent. 2's; a similar showing was on the face of the invoice for the second car shipped on the 25th. Defendant telegraphed plaintiff that the hides were not according to description, that the draft for the first car was returned, and that he would not accept the draft for the second car.

On the 27th defendant telegraphed plaintiff: "To avoid unnecessary expense do not ship hides." Plaintiff offered to hold all hides of number 2's in excess of the fifty per cent. and also offered to ship sufficient number 1's in the third and last car to make up the proper proportion. Plaintiff notified defendant that the third car would contain sufficient 1's to conform to contract and that it expected defendant to receive the hides and pay the drafts.

The third car was shipped August 30th and contained all number 1's, so that the total of the three cars did not contain in excess of fifty per cent. number 2's.

Defendant still refusing to accept any of the shipments

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which had arrived in Milwaukee, the plaintiff's president went to that city and about September 7th offered the three carloads to defendant as and for a compliance with the contract, and defendant still refused to accept. Thereafter plaintiff sold the three carloads in Milwaukee, and for the difference between the contract price with defendant and the amount so recovered and the expenses in connection with the transaction it brought suit against defendant in the civil court.

The part of the complaint material here is as follows:

"2d. That on or about the 10th day of August, A. D. 1917, the plaintiff above named entered into an agreement with one Francis A. Groves, a broker, duly authorized by the defendant to make said agreement for and on behalf of said defendant, wherein and whereby the said plaintiff agreed to sell and the said defendant agreed to receive three carloads of hides, and the said defendant agreed to pay therefor the sum of thirty-one thousand seven hundred sixty-two and 81-100 ($31,762.81) dollars."

A bill of particulars was furnished by plaintiff's attorney upon demand, and it contained the recital that the contract was made August 11, 1917; it also mentioned as one of the elements of such contract, in a description of the merchandise sold, that there were to be *"not over fifty per cent. 2's."*

The original answer contained the following paragraph:

"Admits that on or about the 10th day of August, 1917, the plaintiff entered into an agreement with one Francis A. Groves, a broker, wherein and whereby the plaintiff agreed to sell, and the defendant agreed to purchase, three carloads of hides, *said agreement being in writing.*"

The answer also contained a counterclaim reciting in substance the contract according to the provisions of the written confirmation of sale sent by Groves to plaintiff on August 11th and specifying as one of the conditions thereof that the hides were to run not over fifty per cent. 2's, and that the hides shipped by plaintiff to defendant were not of

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the kind, grade, quality, nor specification as set forth in such agreement, and that by such failure the defendant had been damaged.

The plaintiff served its reply to such counterclaim, wherein it admitted entering into a contract with defendant on or about August 10th whereby the defendant purchased from the plaintiff hides at the price and *quality substantially as set forth in defendant's counterclaim.*

The plaintiff on its behalf took and gave in evidence the deposition of the broker, Groves, who testified that he had been in the hide business about seventeen years and as a broker four or five years and was familiar with the purchase and sale of hides. He testified on his direct examination that the defendant told him to accept the hides on the witness's description that they would not contain over fifty per cent. number 2's, as so informed by telephone conversations with plaintiff's president.

On cross-examination by defendant's counsel the witness stated as to the custom of the trade that when hides are purchased on a basis of fifty per cent. number 2's and they are found on inspection to be of a different percentage, with the permission of the buyer the proportions in the last car may be changed to bring the whole proportion up to the contract terms; that the buyer had the privilege of refusing to accept the shipments containing a greater proportion of 2's than agreed. He also stated that he knew that the first shipments were not a compliance with the contract as outlined in his confirmation; that according to the custom of the trade, when an inspector of such hides proposed for shipment finds that they are running more number 2's than according to the terms of the contract, it is at the option of the buyer whether he rejects them or whether he takes them on a compromise basis.

The civil court submitted the question to the jury as to whether or not there was a contract entered into between

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the parties and on the theory that the telegram sent by Groves, "Accept hides as offered," after he had conversed with defendant, might refer to the offer as understood by Groves upon the telephone conversation or might refer to the offer upon the previous telegram sent by plaintiff which contained the term that "all 2's must be included." The jury found in favor of the defendant, and the plaintiff appealed from the judgment entered in accordance with such verdict. On appeal to the circuit court the judgment of the civil court was reversed and judgment entered for the plaintiff, from which the defendant has appealed.

For the appellant there was a brief by *Robert A. Hess* and *Robinson & Saltzstein,* all of Milwaukee, and oral argument by *Mr. B. F. Saltzstein* and *Mr. Hess.*

For the respondent there was a brief by *Kaumheimer & Kenney* of Milwaukee, and oral argument by *R. I. Kenney.*

ESCHWEILER, J. Plaintiff moved to dismiss the defendant's appeal herein. The motion was argued, and without any opinion being then filed was denied. The grounds for such denial are now set forth.

The judgment in the circuit court was entered March 27, 1920. On March 29th a notice, affidavit, and undertaking on appeal was prepared on behalf of defendant from such judgment. The notice was directed to the clerk of the circuit court and to plaintiff's attorneys. Service thereof was admitted by that clerk April 14, 1920, and it was then marked "Filed." On April 13, 1920, defendant's attorney inclosed a copy of such notice of appeal and undertaking thereon in a letter to plaintiff's attorneys, the attorneys for the respective parties both residing in and having their respective offices in the city of Milwaukee. It is a conceded fact that such letter with the inclosure was received by plaintiff's attorneys not later than the following day. No

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written admission of service was made by plaintiff's attorneys and the copies were not returned.

August 3, 1920, the respondent paid the necessary fees for the transmission of the record, and the record, having as a part thereof the said notice of appeal, affidavit, and undertaking, with admission of service by the clerk of the circuit court, was sent to this court, and filed on August 3, 1920. November 24th the attorneys for plaintiff and respondent admitted in writing due service of four copies of the printed case and made a similar written admission of service of the appellant's printed brief on December 1st. Respondent's counsel subsequently forwarded to the clerk of this court a written stipulation made between the parties that this cause, which was regularly set on the then calendar for argument on December 16th, should be continued to the January, 1921, term of this court without costs to either party and that an order to that effect might be made without other or further notice. The cause was so continued.

On March 21, 1921, a year and a day after the entry of the judgment in the circuit court and just a day after the statutory period for the taking of an appeal had expired, plaintiff's attorneys served notice on defendant's attorneys of a motion returnable April 5th in this court for a dismissal of the appeal on the ground that this court has no jurisdiction either of the subject matter of the appeal or of the person of the respondent upon the grounds hereinafter discussed.

Sec. 3049, Stats., providing for appeals to this court, requires service of written notice of the appeal upon the adverse party and the clerk of the court from which the appeal is taken. Sec. 2820, defining and describing the manner of service, provides, among other things, for personal service by delivery of a copy of the paper to be served to the party or attorney on whom service is to be made.

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Provision is made by sec. 2821 for service by mail where the person making the service and the one on whom it is to be made reside in different places.

Respondent urged that where, as here, the attorneys for both sides resided in Milwaukee, the mailing of the copy of the appeal papers to respondent's attorneys was entirely ineffectual and in no sense a delivery of them or the statutory personal service that is required, and that the personal service required under sec. 2820, *supra,* has been differentiated from service by mail. *Adams v. Wright,* 14 Wis. 408, 414. That for want of a showing of proper service of the appeal papers there is an entire absence of jurisdiction in this court of the subject matter of the appeal as well as of the person of the respondent and no authority to hear the appeal upon the merits or to do more than to dismiss such attempted appeal.

Former decisions of this court passing upon the then statutory provisions as to service and the necessity of proof thereof appearing in the record have been called to our attention and examined, among others *Koch v. Hustis,* 110 Wis. 62, 85 N. W. 643; *Munk v. Anderson,* 94 Wis. 27, 68 N. W. 407; *Herrick v. Racine W. & D. Co.* 43 Wis. 93; *Eaton v. Manitowoc Co.* 42 Wis. 317; *Yates v. Shepardson,* 37 Wis. 315; all of these indicating the strictness with which such rules were formerly applied. The same doctrine was reiterated in the later case of *Haessly v. Secor,* 135 Wis. 548, 116 N. W. 175. That the later judicial decisions, however, were beginning to lessen the rigor with which such statutory requirements had been construed, is suggested in *Liesner v. Wanie,* 156 Wis. 16, 19, 145 N. W. 374.

Subsequent to all of these decisions, however, and in line with the more recent suggestions of this court, the legislature, in the exercise of its wide control over the subjects of the matters which may and the manner in which they shall be appealed (*Dempsey v. Nat. S. Co.* 173 Wis. 296, 181 N. W.

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218), by ch. 219, Laws 1915, passed an act for the declared purpose of simplifying and expediting legal procedure, amending certain specified sections of the statutes, and adding, among others, a new section which now appears as sec. 2836*a*, the material part whereof reads as follows:

"Whenever an appeal is attempted to be taken in a matter, action or proceeding in which an appeal is authorized by statute from any inferior court, tribunal, officer or administrative board to any court of the state, and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction of the appellate court over person or subject matter, unless he shall make such objection by motion to dismiss such appeal before taking or participating in the taking of any other proceedings in said appellate court. . . ."

It is manifest that such section refers to appeals attempted to be taken to this court and is applicable to the present situation.

Prior to this motion to dismiss, the plaintiff, respondent here, admitted due service of copies of the printed case and brief respectively on this appeal and stipulated in writing that the appeal regularly set for hearing on the August, 1920, calendar of this court should be continued to the present term. Upon such stipulation the cause was so continued in this court. By such acts the respondent, before making its objection on the ground of alleged want of jurisdiction by its motion to dismiss, did participate in the taking of other proceedings in said cause in this court within the meaning of this statute. The respondent therefore has waived any right it might have had to question the jurisdiction of this court on this appeal.

Upon the merits we are convinced that the finding of the jury in favor of the defendant on the trial in the civil court upon which judgment was rendered there in defendant's favor should be sustained.

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Prior to Saturday noon, August 11, 1917, Groves, the Chicago broker, had been in communication with plaintiff with reference to the sale of this particular lot of 2,500 to 3,000 hides, and, the prospective customer or customers with whom Groves was then negotiating not agreeing to the terms as proposed by plaintiff, the negotiations in that regard were concluded. Up to this time Groves was in no manner an agent for the defendant. Defendant on his coming to Groves was informed by the latter of the substance of the telephone communications between Groves and the president of the plaintiff at a time when a price of twenty-five cents was under consideration and of the statement therein made that this particular lot of hides was not expected to run over thirty-five or forty per cent. number 2's, but that no guaranty on that point had been offered by plaintiff other than it would not exceed fifty per cent. number 2's. Defendant was not shown the prior telegram from the plaintiff to Groves and relied upon by it in this case as forming the basis of the contract in which the terms were specified that all number 2's must be included at the price of twenty-four and one-half cents. That the broker, Groves, understood the proposition as presented to defendant to include a guaranty by plaintiff that not more than fifty per cent. number 2's was to be included in the transaction is established from the testimony and by the confirmation of the order forthwith executed and mailed by Groves in which such condition is expressly mentioned. Plaintiff was fully apprised of the situation from the start by its receipt of the confirmation and by its calling Groves's attention to the alleged discrepancy between the confirmation and plaintiff's prior telegram and on this particular point. Plaintiff requested an amendment to the confirmation sent by Groves, but none such was ever sent and plaintiff proceeded to ship the goods without any written modification or change in the confirmation of sale by Groves and retained by plaintiff.

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It is true, as urged by respondent, that the defendant in the original answer admitted the making of a contract in writing between the parties, and so long as such admission stood it could well be held to bind defendant, as was held by both the civil and the circuit courts. Such admission, however, did not identify or fix the terms of the contract. The complaint in reciting the plaintiff's version of the contract omitted any reference to any proportion of number 2's that were to be included in the sale, as appears from the quotation given in the statement of facts.

Subsequent to the filing of the complaint the plaintiff made two formal admissions of record that can properly be held as binding on it, as was held the admission of the contract in writing on the defendant. These were (1) the statement in the bill of particulars expressly reciting that the contract upon which plaintiff sued did contain the condition that not more than fifty per cent. number 2's should be included; (2) the reply to the counterclaim admitting that the contract between the parties was as to "the price *and quality* substantially as set forth in the counterclaim," the counterclaim expressly reciting that the contract between the parties did contain just such a provision.

There was therefore ample support for the conclusion arrived at by the jury and sustained by the civil court, namely, that the contract was as claimed by defendant with this fifty per cent. guaranty, rather than as insisted upon by plaintiff during the time of the several shipments and on argument here, as giving it the contract right to include more than such percentage of number 2's.

We cannot accept the theory of respondent that the two telegrams, the one from plaintiff to Groves in which it was stated that at the price of twenty-four and one-half cents *all the 2's must be included,* and Groves's telegram, "Accept hides as offered," constituted the entire and binding contract between plaintiff and defendant and rendered inadmissible

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evidence as to the oral communications between Groves and the plaintiff's president and between Groves and defendant. At the time the telegram from plaintiff to Groves was received Groves was not the agent of defendant, nor acting as broker between plaintiff and defendant, and such telegram relating to then pending negotiations between other persons could not be held to be binding upon defendant. The situation is manifestly different from that presented in the cases cited to our attention in which the broker was acting during an entire transaction and period for but the two parties interested. The telegram, "Accept hides as offered," does not on its face so identify the offer thus proposed to be accepted as to tie it down to the former telegram of plaintiff to Groves, and it presented a situation where the defendant was entitled to show that the offer therein specified as being accepted was the one presented to him by Groves.

Mr. Sauer, plaintiff's president, testified on the trial that after he had been informed that the defendant would not accept or pay for the first carload of hides because it contained about sixty-six per cent. 2's rather than fifty per cent. and that Groves had instructed his inspector to stop work and return to Chicago, he nevertheless insisted on forwarding the second and third cars and induced the inspector to remain to finish the sorting. After the shipment of the first carload, therefore, the second and third were sent by plaintiff knowing that the defendant had elected to declare the contract breached and no longer binding because under defendant's understanding as to the contract it was not being carried out in a substantial respect by plaintiff. Mr. Sauer persisted in his view that he had the right to ship all the 2's in the lot even if they ran beyond the fifty per cent., in spite of protests by Groves and plaintiff and in spite of the fact that Groves had failed to send any modification in that regard of his written confirmation of the sale to defendant. Not until after Mr. Sauer had knowledge of the refusal of defendant to accept the goods did he change his proposition

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with reference to the contract or offer to make up in the third car the deficiencies in the number 1's sent in the first and second cars.

It is urged by respondent that, the purchase being for an entire lot, plaintiff had the right to send a greater proportion than fifty per cent. of number 2's in the first and second car provided that on the completion of the shipment by the three carloads there was ultimately tendered defendant the contract proportion. It is unnecessary here to determine that question as a statement of general law governing such classes of contracts for the reason that the testimony stands undisputed in this case, as given by plaintiff's witness Groves, that in this particular line of business the custom of the trade permits a buyer under such a contract, finding that the first shipment is not in accordance with a provision as to the proportions of the grades of hides, to consider such failure a breach of the contract, and it is then entirely at his option to consent to receive any subsequent shipments with sufficient of the higher quality to make up the deficiency in the prior shipments. It is undisputed that defendant promptly, upon receipt of the invoice showing this discrepancy, elected to cancel the contract. It being undisputed that there was such a custom in this particular business, it of course controlled and governed the rights of the parties in this action, there being no provision in the contract to the contrary.

The defendant, therefore, in view of this testimony, was by virtue of such custom justified in his refusal to accept the first and subsequent shipments of the hides.

It follows that the circuit court erred in reversing the judgment of the civil court and directing judgment for plaintiff, and that the judgment of the civil court should be affirmed.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

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DILWEG, Appellant, vs. MILWAUKEE MACHINE TOOL COMPANY, Respondent.

April 7—May 3, 1921.

Brokers: Volunteered services: Furnishing information as to prospective customer: Promise to compensate broker: Consideration.

1. A broker is not entitled to a commission if he acts as a mere volunteer, though his services are the efficient cause of bringing the parties together, but he must have been employed to negotiate the contract therefor; and though a broker communicated to a manufacturer the fact that a third person was desirous of placing an order for motorcycle engines, but did not do so pursuant to contract, he acted gratuitously and cannot recover a commission.
2. Where plaintiff volunteered to defendant information that a third person desired to place an order for motorcycle engines, a promise by defendant, who obtained the order, to compensate plaintiff will not support a recovery, the promise not being based on any consideration, and the only services on which he relied having already been performed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. R. FOLEY, Judge. *Affirmed.*

On or about November 22, 1913, plaintiff was in the employ of the Gemco Company as an efficiency expert. One Meisner was employed as shop superintendent by said Gemco Company, and was endeavoring to place a contract for the American Cycle Car Company of Bridgeport, Connecticut, for the manufacture of 10,000 motorcycle engines. Plaintiff had broached the proposition to a number of manufacturers in Milwaukee with a view of assisting Meisner in placing the contract. On November 22, 1913, he discussed the matter with Theodore Trecker, president of the *Milwaukee Machine Tool Company.* Trecker said they were not equipped for the performance of such a contract, while *Dilweg* insisted that without great expense defendant's plant could be equipped for the manufacture of the required num-

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ber of engines. *Dilweg* gave Trecker Meisner's telephone number, and as he was leaving he remarked to Trecker, "If you close this I expect mine out of it;" to which Trecker replied, "That's understood." This conversation is also testified to by *Dilweg* to have been as follows: "Now we could all make money out of this and I expect mine out of this;" to which Trecker replied, "That's understood." Nothing further occurred between Trecker and *Dilweg,* and the evidence shows that on or about February 9, 1914, a contract was entered into by the defendant company and the American Cycle Company of Bridgeport, Connecticut, for the manufacture of 10,000 motor engines at an agreed price of $54 each. Whether this contract was the result of negotiations between Trecker and Meisner instituted by Trecker upon the suggestion of *Dilweg* does not appear. When *Dilweg* learned of the consummation of this contract he claimed a broker's commission from the defendant and brought this action to recover the same. The trial court directed a verdict in favor of the defendant, and from the judgment entered thereon he brings this appeal.

For the appellant there was a brief by *Geisenfeld & Geisenfeld* of Milwaukee, and oral argument by *Charles Geisenfeld.*

For the respondent there was a brief by *Quarles, Spence & Quarles* of Milwaukee, and oral argument by *J. V. Quarles.*

OWEN, J. It is well established that "to entitle a broker to compensation he must have been employed to negotiate the transaction in connection with which his services were rendered. In the absence of such employment, or, in other words, where the broker acts as a mere volunteer, he is not entitled to compensation, although his services are the efficient cause of bringing the parties together and result in a sale or other contract between them." 9 Corp. Jur. 554.

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See, also, note to *Geier v. Howells* (47 Colo. 345, 107 Pac. 255) 27 L. R. A. N. S. 786. This principle is decisive of this case. The only service rendered by the plaintiff was to communicate to the defendant the fact that Meisner was looking for some manufacturer who would contract for the production of the gasoline engines. There is no pretense that this information was communicated pursuant to any contract of employment, express or implied, on the part of the defendant. The information was volunteered. Under such circumstances the law imposes upon the defendant no obligation to compensate therefor in the nature of broker's commissions. The plaintiff could not by obtruding this information burden the defendant's future negotiations with such a liability. "One is not obliged to refuse a possible customer because services, which he has not requested, have been obtruded upon him." *Campbell P. P. & M. Co. v. Yorkston,* 11 Misc. 340, 32 N. Y. Supp. 263.

Conceding that the colloquy set forth in the statement of facts amounted to a promise on the part of Trecker that a broker's commission would be paid to plaintiff if a contract were consummated, it is apparent that there was no consideration for the promise, as the only services rendered by the plaintiff upon which he relies as entitling him to a commission were already performed. *Sharp v. Hoopes,* 74 N. J. Law, 191, 64 Atl. 989. The suggestion made by Trecker, if made at all, that plaintiff would "get his" in case a contract was entered into, amounted to nothing more than a gratuity, and was wholly lacking in the essentials necessary to constitute a legal obligation. A verdict was properly directed in favor of the defendant, and the judgment should be affirmed.

By the Court.—Judgment affirmed.

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STATE EX REL. BUES, Appellant, vs. PHELPS, County Clerk, and another, Respondents.

April 7—May 3, 1921.

Taxation: Return of taxable income: Board of review: Failure of taxpayer to object to assessment: Full disclosure of income.

1. Under sec. 1061, Stats., a taxpayer must first appear before the board of review, object to the valuation, and make full disclosure before bringing an action to question the assessment; and under sec. 1087*m*—18 the same rule prevails in the administration of the income tax act. *Westby v. Bekkedal,* 172 Wis. 114, followed.
2. The making of a return of income, although under oath, is not the full disclosure contemplated by the statute and is not conclusive on the board of review; and since the return showed appellant was liable to some assessment, the board had jurisdiction of the person and the subject matter, and he waived his right to bring an action by failing to object and make full disclosure.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Nohl & Nohl* of Milwaukee, and for the respondents on that of the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, and *Daniel W. Sullivan,* first assistant district attorney.

JONES, J. The appellant filed his petition for a writ of *certiorari* to the county board of review of income tax assessments for Milwaukee county and the assessor of incomes praying that the action of the board and assessor in assessing certain taxes be reversed and set aside. After preliminary allegations the petitioner set forth that he duly made a full return of all incomes received by himself and wife and minor child for the year 1917, and made a fair disclosure in his return of all such incomes; that such net

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total taxable income, after making proper deductions, was $6,425.50; that nevertheless the assessor of incomes, disregarding the report and return so made, assessed the sum of $22,000 as being the income subject to income tax for said year, in addition to the sum of $6,425.50, and that said sum of $22,000 nor any part thereof was in fact the income of petitioner.

It is further alleged that during that year the Great Lakes Dredge & Dock Company was a stock corporation and had issued and declared a stock dividend and petitioner's certificate amounted to $22,000; that the dividend was based on net earnings and surplus of the company existing prior to 1917; that this did not enrich petitioner in any manner nor constitute any income during said year; that his interest in the earnings and surplus was no greater after than before the dividend; that it was not a dividend in fact and not taxable income; that no proof was made before the board of the actual value of said so-called stock dividend; that the assessor and board disregarded the evidence produced and made the assessment the sum of $22,000 in excess of the true amount. It was alleged that the assessment was in violation of sec. 1, art. VIII, of the state constitution, and sec. 1, art. XIV, of the constitution of the United States.

The return to the writ alleges that there was no record or evidence noted in the minutes of the board of review of any appearance in person or by attorney of petitioner. It appears from the return that the board of review gave due notice of their meeting for the purpose of examining the assessment roll and considering complaints and that adjourned meetings were held until September 16th, when the board adjourned *sine die*. Written notice bearing date June 5th was given appellant by the assessor as to the increase of his assessment.

Motion was made to quash the writ on the grounds that no appeal was taken to the tax commission pursuant to sec.

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1087*m*—19, Stats., and because the objections named in the writ were not presented to the county board of review, and full disclosure was not made pursuant to sec. 1087*m*—18. The motion was granted. The trial court decided that since the appellant had failed to present to the county board of review any objection to the assessment of his income and had failed to make full disclosure under oath in relation to his income as required by sec. 1087*m*—18 his right to resort to *certiorari* had been lost. The statute is as follows:

"No person subject to assessment by the county assessor shall be allowed in any action or proceeding to question any assessment of income, unless objections thereto shall first have been presented to the county board of review in good faith and full disclosure made under oath of any and all income of such party liable to assessment."

It is argued by appellant's counsel that appellant complied with the statute by making his return in which, as is claimed, he made a full statement under oath of all his income and of proper deductions (sub. 2 (b), sec. 1087*m*—2), and in which he reported the receipt of the stock dividend in question, but made deduction thereof to determine his taxable income. The section above quoted is an essential part of the income tax act. If it was the legislative intent that the board of review is bound to accept the return made on the usual form as a verity, the section of the statute would be mere surplusage. Such a theory is wholly untenable. As will appear from decisions cited in this opinion, it has never been the policy of our statutes or the result of the decisions of this court that the mere statements of the taxpayer, sworn or unsworn, are conclusive on boards of review. Under such a construction of the statute in dealing with persons not very scrupulous who are willing to evade the burdens of taxation, and unfortunately there are such persons, the administration of the taxing laws would be more or less a farce. It is true that when parties avail themselves of the

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opportunity the law gives to appear before the board, and when there is undisputed testimony of witnesses to facts showing that the assessment is erroneous, the board should give heed to such evidence and cannot disregard it. In such cases the courts have often given relief.

It seems unnecessary to discuss the question of the binding force of the statute above quoted, since this court has frequently held that under sec. 1061, a statute very similar, a taxpayer must first appear before the board of review and make his objections to the valuation and make full disclosure before he can bring an action to question the assessment. Among numerous cases which might be cited are the following: *Bratton v. Johnson,* 76 Wis. 430, 45 N. W. 412; *Boorman v. Juneau Co.* 76 Wis. 550, 45 N. W. 675; *State ex rel. Foster v. Williams,* 123 Wis. 73, 100 N. W. 1052; *Milwaukee v. Wakefield,* 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

That the same rule applies in the administration of the income tax act is explicitly declared in *Westby v. Bekkedal,* 172 Wis. 114, 178 N. W. 451. See, also, *Horlick v. Mount Pleasant,* 161 Wis. 366, 154 N. W. 375; *Field v. Milwaukee,* 161 Wis. 393, 154 N. W. 698.

But it is claimed by appellant's counsel that the statute does not apply in this case because, as they allege, the statute purporting to tax stock dividends is unconstitutional and that the assessment of the $22,000 was wholly void. We find some decisions to the effect that, where neither the taxpayer nor his property is within the jurisdiction of the taxing officers except by virtue of an unconstitutional provision of law, no obligation rests on the taxpayer to make objection before bringing suit. *Detroit v. Mackinaw T. Co.* 140 Mich. 174, 103 N. W. 557; *Portsmouth Tp. v. Cranage S. Co.* 148 Mich. 230, 111 N. W. 749. But that is not the situation in the present case. The return of the appellant showed that he was liable to some assessment. The board of review

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had jurisdiction of the person and the subject matter. Under such circumstances, since the board is not concluded by the return made, it is quite possible that a full disclosure might show other taxable income and that such adjustment might be made as would render it unnecessary for the municipality to defend litigation.

The present case is more analogous to that of *Westby v. Bekkedal,* 172 Wis. 114, 178 N. W. 451. In that case two partnerships, one located in this state and one in New York, were engaged in business together. Part of their income was derived from property located and business done in this state and part from business without the state. One of the parties residing in this state made a joint return covering the business of the combined partnership done partly within and partly without the state, and an assessment was made. If there had been an appearance and objection before the board of review and disclosure made, part of the tax would have been properly allocated. The parties residing outside the state made no such objection and disclosure, and it was held that by reason of the statute under consideration they were estopped to object.

Since we hold that the appellant waived his right to maintain the action by his failure to object and make disclosure as the statute provides, it becomes unnecessary to decide the question of the constitutionality of the statute providing for the assessment and taxation of stock dividends.

By the Court.—Judgment affirmed.

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FUTOPOLUS, Respondent, vs. MIDLAND CASUALTY COMPANY, Appellant.

April 8—May 3, 1921.

Insurance: Notice of disability under accident policy: Question for jury: Change of occupation: Amount of damages.

1. In an action on a health and accident insurance policy, where the evidence was uncertain as to whether plaintiff was disabled during the twenty days following the time he quit work on account of an injury, it was for the jury to determine whether notice of the accident was given as soon as reasonably possible in view of the facts and circumstances of the case, and their verdict on the issue must stand.
2. Where plaintiff was insured under an accident and health policy as a "finisher" in a furniture shop, but was injured while employed in a bakery doing shop service in putting bread in boxes, he could recover on the policy as a "baker," which was within the same class of hazards, since the word "baker," in its ordinary use respecting the bakery business, has a generic meaning and includes in its scope different services connected with such business.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought by plaintiff in the civil court of Milwaukee county to recover on a health and accident insurance policy issued to him by the defendant company. Plaintiff contends that on April 3, 1917, defendant executed and delivered to plaintiff, in consideration of the payment of policy and premium fees, a policy of accident insurance insuring plaintiff against loss of time caused either by accident or sickness; that on May 14, 1917, while said policy was in full force and effect, plaintiff became sick and was obliged to discontinue his work and was confined to a hospital under the attention of a physician; that by reason thereof plaintiff was unable to perform the usual duties of his occupation until August 20, 1918; that again on October

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7, 1918, plaintiff became sick and was obliged to be confined to the hospital and to discontinue his work and that he has been unable to return to his work; that the plaintiff has duly performed all of the duties and conditions of the policy and within twenty days from the commencement of said sickness gave the defendant company notice of said illness; that thereafter the plaintiff demanded of the defendant the sum of $40 per month as indemnity under the policy, but that defendant refused to pay the plaintiff; that there is now due and owing to the plaintiff the sum of $720 with interest.

Defendant denies the allegations of the complaint and answers that the plaintiff at the time of signing his application for the policy in question was suffering from disease and in an uninsurable condition, but that he represented to the contrary in the application signed by him; that the defendant believed and relied upon the representations made by the plaintiff and issued to the plaintiff the policy upon which this action is brought; that the plaintiff failed to give notice of his alleged disability as provided in the policy.

The case was tried before a court and a jury. By a special verdict it was found that the plaintiff was wholly and continuously disabled thirty days after the accident; that the plaintiff's occupation at the time the application was taken and the policy issued was that of a finisher in a furniture shop; that at the time of the accident the plaintiff's occupation was that of a baker; that the plaintiff gave written notice to the defendant on May 16, 1917, and that such notice was given as soon as was reasonably possible under the circumstances of the case; that the plaintiff was wholly and continuously disabled seventeen months and eight days to October 7, 1918, and seven months and fourteen days after October 7, 1918; that the plaintiff was under the professional care and personal attendance of a legally qualified physician and surgeon at least once a week for a period of

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twenty-four months. Damages were assessed in the sum of $960. The trial court reduced the damages to $240. Judgment was entered for $275.90. Defendant appealed to the circuit court for Milwaukee county, wherein judgment was affirmed. Appeal is taken to this court.

Orlaf Anderson of Milwaukee, for the appellant.

For the respondent there was a brief by *Fawcett & Dutcher* of Milwaukee, and oral argument by *George C. Dutcher.*

SIEBECKER, C. J. Upon this appeal the defendant raises three questions: (1) Was notice of the accident given defendant in accordance with the statutory provisions of the policy? (2) What was the plaintiff's occupation at the time he was injured? Was it that of baker or baker's helper? (3) If the defendant is liable, is the amount of its liability fixed by sec. (a) or (b) of Part IV of the policy?

It is contended that the evidence shows plaintiff failed to comply with the policy provision requiring that written notice of injury or sickness must be given within twenty days after the date of the accident causing the injury. Admittedly notice was not given within such twenty days. But the jury found that notice was given as soon as possible under all of the circumstances of the case. An examination of the evidence shows an uncertainty upon the point of fact whether or not plaintiff was disabled or knowingly injured by the accident within twenty days after the date of the accident. True, he testifies that he stopped work for the baking company for ten days succeeding the second day after the accident, but it was not clear that he was disabled or sick during this period, and the evidence likewise fails to show as a matter of law that he was disabled or sick any part of the twenty-day period immediately succeeding the date of injury, which required him to give notice of the accident within that period. We think the state of the evidence properly called for a determination by the jury of the

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question whether notice of the accident was given as soon as reasonably possible in view of the facts and circumstances of the case, and their verdict on this issue must stand.

Under the terms of the policy indemnity was provided for plaintiff as a "finisher" in a furniture shop. At the time of accident he was employed by the Atlas Baking Company in the city of Milwaukee. He testified that he was engaged at the time of the accident in handling bread boxes, putting loaves of bread in them, and loading them on trucks, and while so engaged a box fell and struck him about the knee. The service thus described is baker's-shop service and of the kind within the class designated in the company's manual as "B." This service is classified the same as plaintiff was classified in the policy by insuring him as a "finisher" in the furniture business. The jury's finding that plaintiff's occupation at the time of accident was that of a "baker" must be interpreted to mean that he was employed in a bakery, doing shop service. The word "baker" in its ordinary use respecting a bakery business has a generic meaning and includes in its scope different services connected with the bakery business. It is considered that the jury's finding of plaintiff's occupation as a baker is sustained in the sense above indicated and that such employment is within the same class of hazards as the one for which plaintiff was insured.

By sec. (b) of paragraph IV of the policy it is provided that:

"If such injury shall not from date of accident wholly disable the injured, but shall within thirty days thereafter wholly and continuously disable him, . . . the company will pay for the period of such disability, not exceeding six consecutive months, one half of said monthly accident indemnity."

Since plaintiff's disability started within thirty days after the accident but not from its date, recovery is limited to not exceed six months at one half of the monthly indemnity.

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The stipulated monthly indemnity being $40, it follows that plaintiff is entitled to recover under his policy a monthly indemnity of $20 for the period of six months, namely, the sum of $120. Since the amount of the damages awarded is excessive, it must be reduced to the sum of $120. The plaintiff is entitled to recover interest on the amount of this recovery from the time of the commencement of the action and his costs in the civil and circuit courts.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with directions to award judgment in plaintiff's favor for the amount of the damages, interest, and costs as indicated in the foregoing opinion.

RADTKE BROTHERS & KORSCH COMPANY and others, Appellants, vs. RUTZINSKI and another, Respondents.

April 8—May 3, 1921.

Workmen's compensation: Permit to work: Presumption as to nature of employment: Minor employee injured while doing forbidden act: Payment as acknowledgment of liability: Review of award.

1. Where a permit authorizing the employment of a fourteen-year-old boy has been regularly issued, it is not to be presumed that the officials granting such permit neglected their duty or that they regarded the establishment of the employer or the employment as dangerous to life or limb.
2. In proceedings under the workmen's compensation act, the crucial question is whether at the time of the accident the employee was performing services growing out of and incidental to his employment; and a defendant may be held liable for compensation although he has used the utmost care, and a claimant may recover although he has been guilty of contributory negligence.
3. The compensation act must be given a broad, liberal construction to the end that its beneficent purpose should be fully carried out.

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4. An employee fourteen years of age, forbidden to operate a paper-cutter in appellant's print shop, was not entitled to compensation under the compensation act for injuries received while operating such machine at a time when he was engaged in making a tablet for his own benefit and when he was not observed by any one in authority.
5. The fact that the employer paid the injured employee money during the time of temporary disability did not preclude the employer, in a proceeding under the compensation act, from making the defense that the employee at the time of the accident was not performing a service growing out of and incidental to his employment.
6. In a proceeding under the compensation act, where the facts are undisputed, a finding of the commission that the employee at the time of the accident was performing a service growing out of and incidental to his employment is not binding on the courts, the construction of the statute being a question of law.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to set aside an award of the *Industrial Commission* granting compensation for injuries. From judgment sustaining the award plaintiffs appeal.

The applicant, a boy fourteen years of age at the time of the injury, had been employed for a week in appellant's printing and book-binding establishment. He had a permit to work at that age. The evidence established without dispute that his duties were to run errands and to help at other odd jobs such as helping girls fold sheets of paper and pounding books recently bound. His errands were mostly in the shop but occasionally outside. He evidently understood the scope of his duties. His instructions were to keep away from all machines and he knew that he should do so. He was never asked to do any work on a machine.

On the floor of the establishment where his duties kept him most of the time was a paper-cutting machine. The evidence differs whether his work took him very close to this machine; at any rate there was no danger from mere

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proximity. The superintendent at one time saw the boy using a hand machine for cutting pasteboard and ordered him away, warning him that he might get hurt. On the morning of the accident the boy had watched a man operate the paper-cutting machine. He thought he could do it himself and wanted to make a tablet for himself to take home; so later, when he was not observed by any one in authority, he used the machine to cut the edges of his tablet. He succeeded. Still later he tried to use it again to finish the tablet, and this time cut off the ends of two fingers.

The *Commission* found that the injuries were sustained while in the employ of the appellant performing services growing out of and incidental to the employment, proceeding upon the theory that a boy of that age would naturally be attracted to machinery and that the employer should provide better supervision to prevent injury resulting therefrom. Appellants' contention is that this finding is contrary to the evidence and to law and that the *Commission* consequently acted without and in excess of its powers in making the award.

The trial court sustained the award upon the theory that the boy who is impelled to momentarily leave his assigned task to satisfy his desire to see how a machine works is no more outside the scope of his employment than the adult who responds to the desire to rest, to warm himself, or to refresh himself with food.

For the appellants there were briefs by *Brown, Pradt & Genrich,* and oral argument by *L. A. Pradt, Jr.*, all of Wausau.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

JONES, J. One of the claims made by the respondents is that the boy was employed in violation of the child-labor

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law. A letter in the files shows that this matter was not overlooked by the *Commission,* although the subject is not discussed either in the decision of the *Commission* or that of the trial court. It is conceded that there was a permit regularly issued under the statute. It is hardly to be presumed that the officials granting such permit neglected their duty or that they regarded the establishment of appellant or the employment as dangerous to life or limb.

Although it is argued that the applicant worked near this machine, neither the *Commission* nor the trial court so found. It is perhaps true that most of his work was on the floor on which the machine was located, but there is no claim that in performing the work assigned to him there was any danger. The case is not at all analogous to that of *Reiten v. J. S. Stearns L. Co.* 166 Wis. 605, 165 N. W. 337, and *Westerlund v. Kettle River Co.* 137 Minn. 24, 162 N. W. 680, and other cases cited by respondents' counsel where the work to be performed was itself hazardous. In the present case there was no danger whatever in the employment unless the claimant disobeyed instructions and interfered with machinery he was warned not to touch. Neither the *Commission* nor the trial court seemed to regard the employment as in violation of the statute and rules of the *Commission.* The statute and regulations require many precautions before such permits can be issued. Before they are granted the agents of the *Commission* make full investigation and take cognizance of many facts, among others the name of the employer and the nature of the employment. We do not consider the claim that the employment was unlawful well taken.

A question of greater difficulty is this: Did the accident happen while the claimant was performing services growing out of and incidental to the employment? In their able brief attorneys for respondents frankly say: "In these proceedings under the compensation act it is wholly immaterial

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whether either the employer or the servant was guilty of negligence," and yet most of the cases cited by them are common-law actions where negligence and contributory negligence were the issues tried. It must be borne in mind that the issue in this case is not one of negligence or contributory negligence. Under the act a defendant may be mulct in damages although he has used the utmost care. A claimant may recover although he has been clearly guilty of contributory negligence. The crucial question in this case is whether at the time of the accident the employee was "performing service growing out of and incidental to his employment."

In determining this question we fully recognize that the act must be given a broad, liberal construction to the end that its beneficent purpose should be fully carried out. Although there was vigorous opposition to the statute before its enactment, it has been so well administered by the *Commission* that it now meets with general approval. This court has not applied technical rules in determining whether in given cases the accident was incidental to the employment Awards have been approved where the injury happened while claimants were going to or returning from their work. *Milwaukee v. Althoff,* 156 Wis. 68, 145 N. W. 238. A claimant was allowed to recover while temporarily resting and warming himself in the intervals between the coming of cars (*Northwestern Iron Co. v. Industrial Comm.* 160 Wis. 633, 152 N. W. 416), and when sleeping on the premises of the owner when no other place to sleep was furnished (*Holt L. Co. v. Industrial Comm.* 168 Wis. 381, 170 N. W. 366), and where the employee during the lunch hour accidentally fell into a river while going to a toilet which was for use of employees (*Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998). Numerous other decisions of this court might be cited showing a liberal construction of the act.

But we have found no reported case in this state or any

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other where it has been held that an employee may recover under compensation acts for an injury received while doing work entirely different from that assigned him, against orders, and for his own benefit. Lack of precedent would not necessarily prevent us from approving the award in this case; but it is very significant that in the numberless cases which have arisen where this or similar statutes have been construed there is so little authority for the position taken by respondents' counsel. In this state there have been several decisions illustrating that the statute should not be construed to cover accidents occurring outside the employment. *Brienen v. Wis. P. S. Co.* 166 Wis. 24, 163 N. W. 182; *Federal R. M. Co. v. Havolic,* 162 Wis. 341, 156 N. W. 143; *Hornburg v. Morris,* 163 Wis. 31, 157 N. W. 556; *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996; *Ellingson L. Co. v. Industrial Comm.* 168 Wis. 227, 169 N. W. 568; *Foster-Latimer L. Co. v. Industrial Comm.* 167 Wis. 337, 339, 167 N. W. 453.

The language of the English statute on this subject is quite similar to our own. *Federal R. M. Co. v. Havolic,* 162 Wis. 341, 156 N. W. 143. Although the decisions under the English statute are not binding upon us they are persuasive, and they are clear that where a claimant, whether minor or adult, does acts different in kind from what he is expected or required to do, which are forbidden and outside the range of his service, he cannot recover. See cases cited in L. R. A. 1916A, 55.

The following are some of the cases holding the same general rule: *Eugene Dietzen Co. v. Industrial Board,* 279 Ill. 11, 116 N. E. 684, and cases cited; *Reimers v. Proctor Pub. Co.* 85 N. J. Law, 441, 89 Atl. 931; *Carnahan v. Mailometer Co.* 201 Mich. 153, 167 N. W. 9; *State ex rel. Miller v. District Court,* 138 Minn. 326, 164 N. W. 1012; *Payne v. Industrial Comm.* (Ill.) 129 N. E. 122; Harper, Workm. Comp. § 43, and cases cited.

It is strongly urged upon us that boys of this age from

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natural curiosity are apt to intermeddle with machinery and that there should be the most careful supervision to prevent accidents where they are engaged to render service wherever machinery is used. It does not appear in this case that the claimant was led by curiosity to operate the machine, but that after full warning of the danger he undertook to use it to do work for his own benefit. (Although, as already indicated, the statute should be liberally construed, it should not be so interpreted as to make employers absolute insurers against all accidents happening to employees, even though they are minors. It is the legislative policy that minors over fourteen years of age may be employed in industrial work under the very careful restrictions imposed by the statute.) It may fairly be inferred that this policy was adopted because it was deemed better, under the conditions imposed, for boys over fourteen not interested in higher education or not able to attend school to do moderate work than to live in the idleness which leads to immorality and pauperism. (We do not conceive it to be our duty to construe the statute so broadly that no employer would feel safe in employing minors over fourteen years of age. Such a course would be detrimental both to employers and to the working class for whose benefit the statute was in large degree enacted.)

Respondents' counsel refer to the case of *Stoughton Wagon Co. v. Mathison,* decided by the *Industrial Commission* in 1914 and affirmed by the circuit court, and argue that since there have been several sessions of the legislature and revisions of the compensation act it must be presumed that the legislature has adopted the construction placed upon the act in those decisions. That case is distinguishable in several respects; among others it did not appear that the boy had been warned or forbidden to meddle with the machine; he was not doing prohibited work for his own benefit. Moreover, we do not adopt the view that the rule of legis-

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lative construction applies. The *Industrial Commission* renders decisions in many hundreds of compensation cases every year. The decisions of the circuit court are not printed. The only case cited by respondents to this point is *Estate of Week,* 169 Wis. 316, 172 N. W. 732. In that case a practice of procedure with a law had been taken from New York. The construction placed upon the law by the courts of New York had been followed by the county courts and administrative officers of this state for twenty years, with the acquiescence of the legislature. No such general knowledge of, or acquiescence in, the rules laid down in the *Stoughton Wagon Co. Case* has been shown as to lead to the conclusion that the legislature has adopted that decision as part of the law. Moreover, if the meaning of the law is plain practical construction could not override it. *Waldum v. Lake Superior T. & T. R. Co.* 169 Wis. 137, 170 N. W. 729.

Respondents' counsel make the argument that paying the claimant $35 during the time of his temporary disability was an acknowledgment of liability and a ratification of the act of the boy in attempting to use the machine. Whether this was in payment for services or an act of kindness, we do not consider that the appellants should be thereby precluded from making their defense.

Respondents' counsel argue that the question involved is one of fact and that the finding of the *Commission* is conclusive. The facts are practically undisputed, and the construction of the statute is a question of law on which the decision of the *Commission* is not binding upon us. It is our holding that on the undisputed facts the employee was not performing service growing out of or incidental to his employment.

By the Court.—Judgment reversed, and cause remanded with instructions to set aside the award. No costs to be taxed.

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WILL OF MATTHEWS: TUTTLE, Appellant, vs. HIGGINS, Executor, Respondent.

April 8—May 3, 1921.

Executors and administrators: General appraisal of estate: Basis: Computation of inheritance tax: Compensation of executor: Attorney fees.

1. Under sec. 1087—13, Stats., requiring property to be appraised at its fair market value for inheritance-tax purposes, and sec. 3821, requiring the general appraisers of a decedent's property to fix its value in money, the terms "fair market value" and "value in money" are practically identical, the "value in money" being the fair equivalent in money for the thing valued and the "fair market value" the sum for which it could be exchanged in the open market under fair conditions, the purpose of the valuation not being an element to be considered in either case.
2. Fees of an executor under sec. 3929, Stats., should be computed on the value of the estate as determined by the appraisers, unless set aside for cause, where the property is distributed in kind, and, where there is a sale of the property, on the amount received on the sale.
3. The fact that an estate was valued in excess of $250,000 does not warrant the allowance of excessive fees to the attorneys for the executor, but is a factor to be taken into consideration in determining the proper amount to be allowed, as to some extent it fixes the responsibility resting on the attorneys.

APPEAL from an order and decree of the county court of Milwaukee county: JOHN C. KAREL, Judge. *Affirmed.*

By final decree entered April 13, 1920, the county court of Milwaukee county awarded the attorneys for the executor compensation in the sum of $3,500 and awarded the executor fees and compensation amounting to $2,408.19. From the decree *Arthur W. Tuttle,* one of the legatees, appeals.

The cause was originally argued on January 12, 1921. On February 3, 1921, a reargument was ordered upon the following questions:

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1. Where personal property is distributed in kind by an administrator or executor, is the valuation fixed by the appraisers (sec. 3821, Stats.), if unchallenged, conclusive for the purpose of computing the fees of the administrator or executor (sec. 3929)?

2. If it is not conclusive, as of what time should the property so distributed be valued?

(a) Time of the death of the testator or decedent?

(b) As of the time at which the distribution takes place?

(c) As of any intermediate time when it had a value higher or lower than the appraised value?

Arnold C. Otto of Milwaukee, for the appellant.

For the respondent there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Churchill.*

ROSENBERRY, J. The petition for the proof of the will of the deceased was filed May 29, 1917, and the will was admitted to probate August 7, 1917. An inventory was made, and on September 26, 1917, an appraisal was returned and filed. The estate consisted principally of 600 shares of stock in the Matthews Building Company, which were appraised at $350 per share. There were sales of some of the stock. On April 22, 1918, one share sold for $300. April 9th there was a sale of one share for $325. October 1, 1918, proceedings were had which authorized a sale of ninety-seven shares at $175 per share. An interlocutory account was filed December 12, 1918, and approved by the court February 8, 1919. On January 2, 1919, there was a petition filed for re-appraisal of the stock of the Matthews Building Company. The re-appraisal proceeding was participated in by the state and federal officials for the purpose of fixing the amount upon which the inheritance and state taxes should be computed. Upon the hearing the county court determined that the appraisal of 600 shares of the

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capital stock of the Matthews Building Company was correct "and shall stand, in so far as it affects the general appraisement and administration purposes of said estate, at the sum of $350 per share," and "further ordered and adjudged that the shares of stock bequeathed to Percy B. Wright, Frank Abbott, and Eleanor Klumb be and the same are hereby appraised at the sum of $175 per share for inheritance-tax purposes," and fixed the value of the 100 shares disposed of at the amount realized on the sale, to wit, $17,880. The executor's fees were computed upon the value of the estate as determined by the original appraisal as approved by this order in accordance with sec. 3929, Stats. The contention of the appellant here is that the county court was in error in affirming the appraisal and that the value of the stock as determined by the trial court for the purpose of computing the inheritance tax should control. The method by which the county court arrived at the conclusion that the stock was worth $350 per share for general appraisement and administration purposes and $175 per share for inheritance-tax purposes is not disclosed. Under the inheritance tax law the inheritance tax is to be computed upon the value of the estate as of the date of the death of the deceased. *Estate of Week,* 169 Wis. 316, 172 N. W. 732. The value of the assets coming into the hands of the executor is also to be appraised as of that date. If the order of the county court had merely found that the stock was worth $175 for inheritance-tax purposes without affirming the appraisal for general appraisement and administration purposes, a different problem would be presented. The evidence produced is ample to sustain the finding that the stock was worth on the date of the death of the testator $350 per share. The valuation fixed by the appraisers has not been set aside, and we conclude, therefore, that the value fixed by the appraisers must control. By sec. 1087—13,

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Stats., the county court is required, upon application, to appoint a competent person as special appraiser "to fix the fair market value at the time of the transfer thereof of the property of persons whose estate shall be subject to the payment of any tax." By sec. 3821, under the provisions of which the general appraisal is made, it is required that appraisers "shall set down opposite to each item in such inventory, in plain figures, the value thereof in money." Without entering into a philosophical discussion as to the meaning of the terms "the fair market value" and "the value thereof in money," they are, for all practical purposes, identical. The value in money of a thing is a sum of money which is a fair equivalent for the thing valued. Fair market value is more definite, being that sum of money for which the thing could be exchanged in the open market under fair conditions. We are unable to perceive, however, how there can be two widely variant valuations of the same thing at the same time upon substantially the same basis. The fact that one amount is to be used as the basis for computation of the inheritance tax and the other amount for general appraisement and administration purposes is not an element to be considered in determining the value in either case.

The executor being chargeable with the appraisal value of the property coming into his hands and being required to account therefor, we think the sum upon which his fees are to be computed is the value of the estate as determined by the appraisers, unless set aside for cause, where the property is distributed in kind. Where there is a sale of the property the amount received upon the sale controls. Our attention is called to cases decided under the laws of the state of California, the statutes of which are materially different from the statutes of this state. The decisions, therefore, are not helpful in this connection. The error committed was in fixing the value of the state for inheritance-

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tax purposes, a matter which is not before us for review. The valuation so erroneously fixed is not a proper basis for computing the fees of the executor.

The amount allowed the attorneys of the executor is also attacked as excessive. The total value of the estate was in excess of $250,000. While the value of the estate does not warrant the allowance of excessive attorney's fees, it is a factor to be taken into consideration in the determination of a proper amount to be allowed, for to some extent it fixes the responsibility resting upon attorneys. All the evidence offered was to the effect that the charge made by the attorneys for the executor was a customary and reasonable charge. Charges of attorneys, especially in the administration of estates, should be reasonable and just. The evidence introduced by the executor is not met except by way of argument. Upon the facts established, we are unable to say that the trial court was clearly wrong in awarding $3,500, although the amount seems to us, in view of the amount of work done, to be at least a maximum charge.

By the Court.—The decree appealed from is affirmed.

BEHNKE, Appellant, vs. KROENING and wife, Respondents.

April 8—May 3, 1921.

Fraudulent conveyances: Want of consideration of mortgage: Bills and notes: Notice of infirmity in instrument: Knowledge of officers of bank: Estoppel: Bill of exceptions: Settlement after expiration of time to appeal: Advisory verdict: Effect of error in instructions: Sufficiency of exceptions.

1. A bill of exceptions can be settled after the time for an appeal has expired, without stipulation by the parties to the action, where proper extension of time has been made, under secs. 2831, 2876, Stats.
2. An exception, "Plaintiff excepts to the findings and conclusions of law herein dated April 8, 1919," was wholly insufficient to entitle appellant to a review of the evidence to determine whether or not the findings were supported by the evidence.

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3. The fact that the trial court gave an incorrect instruction to an advisory jury which may have misled them could not be the foundation for prejudicial error upon appeal, where the trial court in its opinion declared that such incorrect rule had been given to the jury, but then proceeded to make its findings under the evidence upon all the issues in view of such misdirection of the jury.
4. It was not prejudicial error, in a trial before the court, to receive evidence of a conversation between defendant and a third person in plaintiff's absence, where the facts involved in the conversation were abundantly supported by other competent evidence.
5. Conveyances of property made in fraud of creditors, while void as to creditors, are valid between the parties; but want of consideration may be set up as a defense in an action to foreclose a mortgage executed to defraud creditors.
6. The knowledge of the president and cashier of a bank that a note which the bank purchased from its president was of fraudulent inception and character was notice to the bank.
7. One who executed a mortgage and note to defraud creditors was not estopped to set up lack of consideration for the note as a defense in an action by a transferee of the note and mortgage who had participated in the original transaction, since such transferee could hardly be misled as to the true facts and thus innocently induced to do what he did to his disadvantage.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was brought to foreclose a mortgage executed and delivered to C. W. Behnke on August 11, 1903, for $2,000, payable in four years from that date at the rate of five per cent. per annum. The mortgage was subsequently assigned on March 7, 1905, to the First State Bank of Brillion, and by it, on September 19, 1906, to the plaintiff. As a defense defendants allege that the mortgage was given without consideration and was given upon advice of the plaintiff for the express purpose and intent of defrauding the creditors of the defendants. Plaintiff denies the material allegations of defendants' answer.

The case was tried before the court, the court taking an advisory verdict of the jury. The court found, as did the jury,

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that when the plaintiff purchased the note and mortgage in question from the First State Bank of Brillion on September 19, 1906, he knew that the note and mortgage had been executed and delivered by defendants to C. W. Behnke without any consideration therefor and with the fraudulent intent and purpose on the part of the parties to these instruments to prevent the collection of any judgment which the estate of Gotfried O. Krueger, deceased, might recover against said *Reinhard Kroening* in the action brought against him by the administrator; that plaintiff was not requested by defendant *Kroening* shortly before plaintiff purchased the note and mortgage from the bank to do so, for the reason that the bank was then threatening to begin an action for the foreclosure of the mortgage; that it was not understood, when plaintiff purchased the note and mortgage from the bank, that the debt secured thereby should be paid to plaintiff by *Reinhard Kroening;* that when C. W. Behnke and Oscar C. Behnke gave their promissory note for $2,000 to *Reinhard Kroening* on August 11, 1906, it was not agreed between them that that note and the life insurance policy assigned therewith as collateral security were to be accepted by *Reinhard Kroening* in lieu of the return and surrender to him of the note and mortgage in suit which were then held by the bank; that when the judgment against Tesch and Abitz was assigned by Oscar C. Behnke to *Reinhard Kroening* it was not then agreed by and between Behnke and *Kroening* that the proceeds of said judgment should be applied as a payment on the note which Oscar Behnke and his father, C. W. Behnke, had executed to *Kroening* on April 11, 1906.

The trial court made additional findings upon all of the other issues in the case and found expressly that the note and mortgage in question were executed for the fraudulent purpose of hindering, delaying, and preventing the collection of any judgment that might be secured against *Kroening* by the administrator of the Krueger estate; that plaintiff at

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the same time and for the same fraudulent purpose received from *Kroening* a note on *Kroening's* real-estate mortgage securing payment of $6,000, and a chattel mortgage on *Kroening's* personal property for $2,000; that all of said instruments, including those involved in this action, were antedated by the parties and recorded and filed for the fraudulent purpose above stated, with full knowledge thereof by the mortgagees; that all of the mortgagees well knew that neither of said defendants received nor the mortgagees paid any consideration for these notes and mortgages, and that payment of such fraudulent claims should never be enforced against the defendants; that the mortgage and note in suit were held by C. W. Behnke and were placed by him in the Bank of Brillion, of which he was then president, and of which Oscar C. Behnke, who drew the papers and knew of their fraudulent character, was cashier; that this note and mortgage remained in such bank when C. W. Behnke caused it to be incorporated and that he was thereafter its president and Oscar Behnke continued as its cashier; that in the spring of 1904 the bank and its assets were sold to Edward Decker and associates; that this note and mortgage continued in the bank's possession until March, 1905, when C. W. Behnke personally assigned it to the bank; that on September 19, 1906, the bank sold and assigned this note and mortgage to the plaintiff for the sum of $2,000; that *Kroening* paid the interest thereon to plaintiff from 1909 to 1917, inclusive, the principal sum, with interest thereon from 1917, remaining unpaid.

The trial court held that plaintiff was not a holder in due course of this note because the knowledge of C. W. Behnke as president and Oscar C. Behnke as cashier of the bank of the fraudulent character of the note and mortgage and the want of consideration for these papers was attributable to the bank, and hence the bank was not a holder of them in due course, and that the defense of want of consideration

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is pleadable against the plaintiff in his suit to enforce the note and mortgage.

Judgment was awarded dismissing the action without costs in favor of either party, the plaintiff to pay the clerk's fee. This is an appeal from such judgment.

For the appellant there was a brief by *Friedrich & Hackbarth* of Milwaukee, and oral argument by *Otto G. Hackbarth.*

For the respondents there were briefs by *Hougen, Brady & Meyer* of Manitowoc, and oral argument by *Charles E. Brady.*

SIEBECKER, C. J. The respondents move to strike the bill of exceptions from the record upon the ground that it was not proposed or settled within a year from the date of service of notice of entry of judgment, and that the extension of time to propose and settle it was granted after the expiration of such year upon the sole ground of the negligence of appellant's attorney. It is contended that it is an established rule of practice that no bill of exceptions can be settled after the time for an appeal has expired, except upon a stipulation by the parties to the action. This claim is asserted on the declaration made by this court on the subject in *Nelson v. A. H. Stange Co.* 140 Wis. 657, 123 N. W. 152; *Shafer v. Eau Claire,* 105 Wis. 239, 81 N. W. 409; and *Gemert v. Pooler,* 171 Wis. 271, 177 N. W. 1. While it is asserted in these cases that this practice should be followed, it is not held that the court may not, upon good cause shown, allow a bill of exceptions to be settled and served after the time for appeal has expired. That the time for proposing and settling a bill of exceptions after the expiration of sixty days from notice of entry of judgment as prescribed in sec. 2876, Stats., may be extended under the provisions of sec. 2831, providing for the enlargement of time within which any proceeding in an action must be

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taken, has been approved in *Kelly v. Fond du Lac,* 29 Wis. 439; *Milwaukee Co. v. Pabst,* 64 Wis. 244, 25 N. W. 11. The last clause of sec. 2831 provides that such an enlargement of the time may be allowed by a court "on motion and good cause shown, in discretion and upon such terms as may be just . . . after the time limited by or in pursuance of the statute or by any order of court has expired." This provision is in its terms applicable to enlarging the time for settling a bill of exceptions after the time for appeal has expired, and we know of no good grounds why it should not be held to include applications like the one in question here.

It is also argued that the court abused its discretion in extending the time for settling the bill upon appellant's application because the facts stated by plaintiff do not constitute a good cause for the relief asked. We have examined the affidavits setting forth the facts upon which the application is made and other parts of the record pertaining to the delay in serving and settling a bill of exceptions and are of the opinion that the facts stated constitute a sufficient basis for the action of the circuit court and hence it cannot be said that the circuit court abused its discretion in enlarging the time for settling the bill, and the motion to strike it from the files must be denied.

It is contended that the exceptions to the court's findings of fact are wholly insufficient to entitle appellant to a review of the evidence to determine whether or not the findings are supported by evidence. The only exception to the court's findings is a general one in these words: "Plaintiff . . . excepts to the findings and conclusions of law herein dated April 8, 1919." That such an exception is wholly insufficient is well established. As declared in *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663:

"The exceptions to the findings of fact are general, and do not point out specifically any particular finding of fact

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as erroneous. They are not sufficient, therefore, to entitle the defendant to call upon the court to revise the findings of fact. The office of an exception is to specify or point out some particular matter as erroneous, in order that it may be reviewed." *Statkawicz v. Laguna,* 155 Wis. 304, 143 N. W. 677, 144 N. W. 1133.

Although no sufficient exceptions have been preserved to call for a review of the evidence, the record has been examined and we are satisfied that the trial court based its findings of fact upon competent and material evidence.

Objections to instructions are called to our attention. The verdict of the jury was an advisory one, and the court specifically made its findings of facts on all of the issues tried. The trial court in its opinion declares that an incorrect rule given to the jury may have misled them, but the court then proceeds to make its findings under the evidence upon all of the issues in view of such misdirection of the jury. Under these circumstances, any such misdirection of the jury could not have entered into the final determination of the case by the court, and hence cannot be the foundation for prejudicial error upon review in this court.

It is argued that the court erred in receiving evidence of a conversation between defendant and an employee of the bank in plaintiff's absence. The facts involved in this conversation are abundantly supported by other evidence in the case. It is manifest that the competent evidence fully sustains the court's findings on this subject and hence an erroneous admission of these conversations was in no way prejudicial error. True, as claimed by appellant, it is held in the cases of *Clemens v. Clemens,* 28 Wis. 637, and *Davy v. Kelley,* 66 Wis. 452, 29 N. W. 232, that conveyances of property made in fraud of creditors, while void as to creditors, are valid between the parties.

The trial court held that, while there is a marked conflict in the authorities on this proposition, the law in this state is as declared in these two cases. The circuit court, however,

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held that want of consideration may be proven in such cases and that the *Clemens* and *Davy Cases* so declare. It is stated by Mr. Justice TAYLOR in the *Davy Case* that had the goods not passed to the maker of the note there in litigation, which was given to cover the purchase of the fraudulently conveyed property, then the failure of consideration for the note might be available as a defense to the note. Citing *Dyer v. Homer,* 22 Pick. 253. In the *Dyer Case* it was held that a conveyance of property for the purpose of defrauding creditors is a good conveyance between the vendor and vendee; yet if the vendee receives only a part of the property conveyed, then there is a failure of consideration except as to property the vendee received, and the partial failure of such consideration is a defense *pro tanto* in a suit on a note given to evidence the consideration of such sale. We are of the opinion that this doctrine is recognized in the *Clemens* and *Davy Cases* and that the trial court correctly held that "this defense is therefore available in this action unless he [the plaintiff] is a holder in due course, or derives his title through a holder in due course, and is not himself a party to any fraud or illegality affecting the instruments." Sec. 1675—54, Stats. By this section it is provided that

> "Absence or failure of consideration is a matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise."

Under the facts of this case it is well established and found that plaintiff was a participant in the fraud of defendant and C. W. Behnke that led to the giving of the note and mortgage in suit, hence under sec. 1676—22 he had full knowledge of the facts that the note was not given for value and of its infirmity and the defect in the title in the hands of C. W. Behnke. But it is asserted that plaintiff acquired the right of a holder in due course when the note was trans-

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ferred to him by the bank under the provisions of sec. 1676—28, Stats. This claim cannot be sustained because, as the trial court found, the bank had notice of the infirmity and defect in the title to the note in the hands of C. W. Behnke when it procured it by purchase. It is clear that the knowledge of C. W. Behnke and Oscar Behnke, who were, respectively, the president and cashier of the bank, of the fraudulent inception and character of the note, is notice to the bank, and hence the bank knew of the infirmity and defect of title in the note when it acquired it. *Paulson v. Boyd,* 137 Wis. 241, 118 N. W. 841; *Union Inv. Co. v. Epley,* 164 Wis. 438, 160 N. W. 175. The trial court held: "The burden of proof is on plaintiff to show that the bank was a holder in due course. Sec. 1676—29, Stats. He has produced no evidence to that effect excepting the assignment from C. W. Behnke to the bank." As indicated under the facts disclosed, the bank was not a holder in due course; this leaves the plaintiff not a holder in due course, and hence he is not protected under the provisions of sec. 1676—28. We are satisfied that the court's findings to the effect that plaintiff did not purchase the note at *Kroening's* request or that *Kroening* at the time plaintiff bought it from the bank or at any other time did not promise to pay the note as claimed by plaintiff, are not against the clear preponderance of the evidence and must stand.

The contention that defendants are estopped from asserting the defense of a want of consideration under the facts and circumstances is not well founded in the light of the facts that plaintiff was a participant in the fraudulent transaction that led to the execution and delivery of the note and mortgage by the *Kroenings* to C. W. Behnke and his knowledge that the instruments were given without any consideration passing between the parties. Under such circumstances the plaintiff could hardly be honestly misled as to the true facts and thus be innocently induced to do what he did to

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his disadvantage. *Zwietusch v. Luehring*, 156 Wis. 96, 144 N. W. 257, and cases there cited. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

WEINHAGEN, Respondent, vs. HAYES and others, Appellants.

May 6—July 3, 1920.
January 15—May 31, 1921.

Principal and agent: Principal charged with knowledge of agent: Real-estate brokers: Accepting commissions from both principals: Effect: Rescission on discovery of fraud: Cancellation: Discretion of court: Waiver of right to rescind: Appeal: Weight accorded general findings: Principal and surety: Release of surety upon rescission: Accounting: Second application for rehearing.

1. Where a landowner in negotiating a lease of his property was represented throughout the entire transaction by an agent, the landowner, who paid commissions to certain persons who in fact represented the lessees, is charged with whatever knowledge his agent may have had as to such persons' agency for the lessees. *On rehearing:* The lessor's agent in negotiating the lease with agents who did not pretend to be negotiating in their own behalf was chargeable as a matter of law with knowledge of the fact that the agents represented some undisclosed principal.
2. An agent's duties are not lessened or modified because he calls himself a broker or factor, and agents representing prospective lessees are not justified in accepting commissions from the opposite party, regardless of custom.
3. Though a lessor, who paid commissions to the agents representing the lessees without their knowledge or consent, had no fraudulent purpose, his act whereby he made the lessees' agents his own is a fraud upon the lessees.
4. Where the lessor, without the knowledge or consent of the lessees, paid commissions to their agents, the lessees on discovery of the fraudulent conduct of their agents have a right to rescind the contract.
5. An application for the cancellation or rescission of a contract is addressed to the sound discretion of a court of equity.

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6. The rule that the appellate court will not overturn findings of the trial court unless against the clear preponderance or the great weight of the evidence does not apply to findings which are general in their nature.
7. In an action by a lessor to recover amounts due under a long-time lease which the lessees rescinded for fraud, the lessor having made payments to their agents, the evidence is *held* to establish the fact that the lessees did not learn of the payments until a few months before the rescission.
8. The fact that the lessees, after discovering that the lessor had made payments to their agents who negotiated the lease, attempted to dispose of the property, while a circumstance on the question of waiver of the right to rescind is not conclusive.
9. Where the facts as to the conduct of the lessees, after discovering that their agents had received commissions from the lessor, were not in dispute, the question whether they had waived the right to rescind the contract is one of law.
10. An inference of intent to waive the right to rescind does not readily arise where the situation in which the party required to elect finds himself is the result of the fraud or misconduct of the opposite party.
11. Where the rights of the parties in nowise changed after the lessees discovered that the lessor had paid commissions to their agents, mere delay of a few months on the part of the lessees in announcing an election to rescind will not establish a waiver of such right, the lessees having incurred large obligations outside of and beyond the contract and having expended considerable sums of money.
12. A surety on a bond given by a lessee is not liable where the lease was rescinded for the lessor's fraud in paying commissions to the lessee's agent, the obligation in nowise guaranteeing the genuineness of the lease.
13. Where the parties entered into a long-time lease, and the lessees, on discovering that the lessor had made payments to their agents, elected to rescind, they should, in so far as possible, be placed *in statu quo,* and there should be an accounting between them; but the lessor is not chargeable with losses due to the faults or mismanagement of the lessees, and the latter, who must return the property to the lessor, cannot recover any sums paid by him to their agents.
14. A second application for rehearing was denied as not proper practice.

SIEBECKER, C. J., and VINJE and JONES, JJ., dissent.

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APPEAL from a judgment of the circuit court for Milwaukee county: EDWARD T. FAIRCHILD, Circuit Judge. *Reversed.*

The plaintiff is a resident of the city of Milwaukee and the owner of certain real property. The land increased in value so as to make it unprofitable for renting purposes with the buildings then on it. He did not care to make the necessary investment for the purpose of erecting buildings, and indicated to one Schenck, a real-estate agent, that he would lease the property upon satisfactory terms. The defendant Hyatt was a resident of Detroit, and associated with Harvey and McClure in real-estate deals. Hyatt was a friend of the defendant *Carrow* and introduced *Carrow* to McClure, whom they sought to interest in a long-term lease proposition in the city of Milwaukee. *Carrow* brought the matter to the attention of his business associate, *H. J. Hayes*. McClure then presented the matter to *Hayes* and *Dr. McFall*, another friend of *Carrow*, and an arrangement was made by which McClure and Harvey were to procure a long-time lease on Milwaukee property for *Hayes, Carrow,* and *McFall.*

McClure and Hyatt visited Milwaukee and there met Carl Remeeus and plaintiff's agent, Otto Schenck. Negotiations were entered into between McClure and Hyatt on one side and Schenck on the other, with Remeeus interested, and finally on October 2, 1911, *Weinhagen* executed a lease to *Hayes,* which was signed by *Hayes* on October 13, 1911. The lease as finally signed was substantially in the form proposed by *Weinhagen.* In the meantime, in August, *Hayes* and *Carrow* had visited Milwaukee, had seen the property, but made no further investigation in regard to it. Before McClure and Hyatt would disclose their principal they demanded a commission of $12,000 from *Weinhagen,* in which Schenck was to share. It was finally agreed that

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McClure and his associate, Harvey, and Hyatt were to receive $6,000 from *Weinhagen,* the remaining $3,000 of the $9,000 which *Weinhagen* had agreed to pay to be taken by Schenck.

By the terms of the lease the lessee was required to give a bond to secure the performance of its conditions, and on November 17, 1911, *Hayes, Carrow,* Bartholomew, another associate of *Hayes, McFall,* Harvey, and McClure signed the bond. E. H. McFall, father of *Dr. Guy H. McFall,* guaranteed the performance of the bond so far as his son was concerned. Harvey, McClure, Hyatt, and Remeeus then received the $6,000, of which $2,000 was in cash and the balance in notes due in 1913 and 1914, but payable only if the taxes were paid by *Hayes* to and including 1914. Harvey and McClure then sold the notes to Remeeus at a discount. The defendants *Hayes, Carrow, McFall,* and Bartholomew had an arrangement with Harvey and McClure by which Harvey and McClure were to receive as compensation for conducting the negotiations on the part of *Hayes* and his associates, a one-fourth interest in the net profits which should result from the transaction.

In 1913 *Hayes* did not pay the taxes when they became due. Remeeus therefore could not collect the commission notes which he had purchased from Harvey and McClure. Remeeus arranged to have a company organized which company should loan *Hayes* money enough to pay the taxes, *Hayes* giving his notes for $6,400 to the company. Remeeus took the $2,000 commission notes to *Weinhagen* with $6,200 in cash, and *Weinhagen* paid the taxes, *Hayes* in the meantime having assigned the lease to the company which loaned him the money, as collateral for his note, the lease being executed by *Hayes* individually, for himself and his associates *Carrow, McFall,* and Bartholomew.

The property continued to run behind, *Hayes* defaulted in the payments of rents, and in 1915 *Weinhagen* brought

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suit for the unpaid rent, and in this suit Remeeus was appointed receiver. This was done to prevent the company which held *Hayes's* note from collecting the rents. Remeeus remained receiver down to the time of the trial.

On behalf of *Hayes* and his associates it is claimed that they had no knowledge of the payment by *Weinhagen* of commission to Harvey, McClure, and Hyatt until the month of July, 1916. In November, 1916, *Weinhagen* began this action. *Hayes, Carrow,* and *Guy McFall* answered January 30, 1917, and in their cross-complaint set up the payment of the double commissions, charged *Weinhagen* with fraud, and repudiated the lease and bond.

The trial court found that the plaintiff had paid commissions as hereinbefore stated; that McClure and Harvey had produced *H. J. Hayes* as a customer for the lease; "that at the time of the agreement to pay and the payment of such commissions to said McClure, Harvey, Remeeus, one Clark C. Hyatt, and Schenck, and at all times prior to the execution, delivery, and acceptance of said lease and for a long time thereafter, the plaintiff was without any knowledge or notice that any or either of them were in the employ of or represented the defendant *Hayes* or any of his associates in any manner whatsoever, or that they were, or any of them was, in anywise interested with the said *Hayes* or his associates in the profits to be derived by the lessee of said premises, or in anywise acting or undertaking to act for the defendant *Hayes* and his associates, or any or either of them;" that there was no conspiracy between the defendants Harvey and McClure and Hyatt and plaintiff; found the facts in relation to the default of the lessee, *H. J. Hayes,* from which it appears there was due at the time of the trial from *Hayes* large sums; found further that *H. J. Hayes* had not commenced the construction of a building upon the premises, as he was required by the terms of the lease to do, and that in consequence of his failure to do so there was due

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to the plaintiff $15,000 as liquidated damages, with interest; that by reason of the defaults of the defendant *Hayes* there was due to the plaintiff on the 17th day of June, 1918, the sum of $35,325.93, principal and interest; found the facts in regard to the execution of the bond, and "that Eugene McFall died in the month of January, 1917 (this action having been commenced November 25, 1916), a resident and inhabitant of Erie county, Ohio, leaving a last will and testament, duly admitted to probate in the court of proper jurisdiction in such county, and naming *Guy H. McFall, Anna J. McFall,* and *Elizabeth A. Lewis* as executors; . . . that the action was revived against such executors by their entering their appearance upon the trial of this action and by specific consent being given in open court, and answer and cross-complaint were made and filed by them, such consent being limited to cover the revival of the action as it then stood; that later in the proceedings upon the trial, plaintiff amended his complaint so as to charge additional defaults as in the amendment on file set forth, to which amendment counsel for said executors objected, insisting that he had no authority to consent to the revival of the action, excepting as it stood before the amendment;" further, the facts in relation to the receivership, and "that the defendants W. C. McClure and H. B. Harvey were the agents of *H. Jay Hayes* in the matter of negotiating the said lease, and represented the said *Hayes* and his associates in the negotiation of the lease, and were to receive as their compensation for acting as such representatives a proportion of the profits, if any, made in the transaction; and neither said Schenck, nor said Remeeus, was in any manner such agent or so represented said *Hayes* or his associates, and was in no manner employed or engaged by any or either of them and had no interest in any such compensation or profits;" and further found "that after having knowledge (before the commencement of this action) of the payment

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by the plaintiff of the moneys aforesaid to the defendants Harvey and McClure, and of the payment by the said Harvey and McClure of a part thereof to said Clark C. Hyatt, the defendants *H. Jay Hayes, H. P. Carrow, Guy H. McFall,* and R. A. Bartholomew continued to exercise acts of ownership of said premises under and by virtue of the lease and elected to hold and assert the interest of the lessee therein, and have by their conduct, since obtaining such knowledge, waived their rights, if any they ever had, to have said lease or bond canceled, and have elected to retain said lease and the benefits thereof."

The proper and necessary conclusions of law followed, and judgment was rendered in favor of the plaintiff against *Hayes* for the sum of $22,976.40; and in favor of the plaintiff against *Carrow, Guy H. McFall,* McClure, Harvey, and R. A. Bartholomew, and *Guy H. McFall, Anna J. McFall,* and *Elizabeth A. Lewis,* as executors of the last will and testament of Eugene McFall, for the sum of $15,000, the amount of the bond; and dismissed the cross-complaint of the defendants upon the merits. From such judgment the defendants *Hayes, Carrow, Guy H. McFall,* and the executors of the estate of Eugene McFall, appeal.

For the appellants there were briefs by *Miller, Mack & Fairchild* of Milwaukee and *Beaumont, Smith & Harris* and *Henry C. Walters,* all of Detroit; and the cause was argued orally by *Mr. Hal H. Smith* and *Mr. Walters.*

For the respondent there was a brief by *John H. Paul* and *Glicksman, Gold & Corrigan,* all of Milwaukee, and oral argument by *Nathan Glicksman.*

The following opinion was filed July 3, 1920:

ROSENBERRY, J. We wish to commend the careful, lawyer-like, and thorough manner in which this case has been prepared for presentation to this court by the attorneys on both sides. We are furnished with a printed case, the

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index to the exhibits gives a short statement as to what the exhibit is; an index which simply says that exhibit so and so may be found on page so and so, requires us to look at a large number of exhibits before the one which we seek may be found. A short statement, as "Letter Remeeus to *Carrow,* June 3, 1916," indicates in a general way the character of the exhibits and saves much time and search here. Each of the briefs is arranged in an orderly way, and at the beginning of the brief is a subject index which refers in detail to the matters set out in the brief, contains an outline of the argument, and authorities presented, with references to the pages of the brief on which the various topics are discussed. Such an index or outline is very helpful in our study and consideration of the cases here, and requires but comparatively little time for preparation on the part of attorneys. Such an index or outline is required under the rules of the United States supreme court. While up to the present time we have not felt warranted in adopting such a rule here, our labors would be greatly lightened, and we should be able to give more time to important matters, if in cases involving many points such an outline were made and printed at the beginning of the brief. In the present assignment there are thirty-four cases, containing 3,861 pages, in which hundreds of cases are cited. Manifestly anything which saves us time in searching through briefs, page by page, enables much more time to be devoted to matters of argument and authority. This practice has been adopted in many cases heretofore presented, and we take this occasion of commending it to the attention of the profession generally.

We shall not attempt to treat in detail all of the questions raised and argued in briefs of counsel. We shall first dispose of the question raised as to whether or not the plaintiff was charged with the knowledge of Schenck, his agent, in respect to the transactions relating to the negotiation and execution of the lease in question. The trial court did not

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find directly upon this point, but found that the plaintiff had agreed to pay McClure, Harvey, and Remeeus $6,000, and had agreed to pay Schenck $3,000, upon procuring a lessee of the premises who would accept a lease prepared by the plaintiff and embodying terms dictated by him. We have carefully considered the argument of counsel and the evidence, and are convinced that Schenck was the agent of *Weinhagen* and not a mere middleman employed to sell a specified definite property upon a commission. The whole transaction arose through the suggestion made by the plaintiff to Schenck that he desired to procure a long-time lessee for the property. Throughout the negotiations Schenck represented plaintiff, and we are of the opinion, therefore, that the plaintiff must be charged with whatever knowledge Schenck had as to the agency of McClure, Harvey, and Hyatt.

The trial court found that the persons aforesaid, that is, McClure, Hyatt, Remeeus, and Schenck, merely produced the defendant *H. Jay Hayes* as a proposed lessee. We think this finding is clearly against the preponderance of the evidence. It appears practically without dispute that McClure and Harvey and their employee, Hyatt, came to Milwaukee for the purpose of looking up a lease, and throughout the entire negotiation, down to the point where they demanded a commission, represented an undisclosed principal and not themselves. When the negotiations had proceeded so far that the introduction of the proposed lessee was necessary, McClure and Harvey made a demand for the commission in question. It taxes human credulity to believe that under such circumstances Schenck did not know that McClure and Harvey represented the proposed lessee.

When *Hayes* and his associates came to Milwaukee they made no inquiry in regard to the property, no investigation of local conditions, but simply viewed the property and took a general survey of the city, and it is established beyond

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question that they relied upon their agents, McClure and Harvey, throughout the entire negotiations. We find no evidence in the record as to any specific knowledge that the plaintiff had in regard to the relationship between McClure, Harvey, and Hyatt and the lessees, but that Schenck had such knowledge seems to us to be established beyond question.

The plaintiff being chargeable, therefore, with knowledge of the fact that McClure and Harvey were the agents of *Hayes* and his associates, what effect upon the contract did the payment of the $6,000 by the plaintiff have? It is argued that the circumstances here are within the principles referred to in *Tasse v. Kindt,* 145 Wis. 115, 128 N. W. 972. In that case it was held that a broker who undertakes merely to procure a customer for land at a price fixed by the seller is in reality only a middleman and is entitled to the agreed commission for such service, even though by an agreement unknown to the seller he is also to receive a commission from the purchaser. In the present case the agents of the lessees were not agents to procure a long-time lease at a fixed price, but represented their principals in securing a location of the property, fixing the terms and conditions of the lease, upon which its value very largely depended, and throughout a long period of negotiation attempted to secure a contract which would be acceptable to their clients and in the judgment of the agents a profitable investment. They were invested with large discretion in many respects. They cannot be said in any sense of the term to have been mere middlemen. The question cannot be regarded solely from the standpoint of the plaintiff, but in considering the effect upon the contract of the double agency the relationship of the double-dealing agents to both parties to the transaction must be considered.

It is the established law that the acceptance by an agent of a secret commission of compensation from the opposite

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party, where the agent is to exercise, on behalf of his principal, skill and judgment, vitiates the contract, and the principal who has thus been imposed upon may rescind the contract even though the other party paid the commission or compensation in good faith. 2 Mechem, Agency (2d ed.) § 2138, and cases cited.

Absolute fidelity and loyalty to the interests of his principal is the first duty and the highest obligation of an agent. An opposite party negotiating a contract with an agent may not deprive the agent's principal of the benefit of the agent's skill and judgment by paying him a commission, without the full knowledge and consent of the principal, and if he does so it operates as a fraud, actual or constructive, upon the principal, and he may for that reason repudiate the transaction.

The perusal of the testimony of some of the witnesses in this case indicates that there is a very confused state of mind on the part of many real-estate agents as to their rights, duties, and responsibilities in transactions of this kind. The payment of compensation or a commission to the agent of the opposite party is in some states punishable as an offense under the law. More and more the business world is compelled to rely upon the fidelity of agents in the transaction of business, and an agent who undertakes to negotiate a contract or transact business for a principal should be held strictly accountable for the faithful performance of his duty. An agent's duties or responsibilities are not lessened or modified because he calls himself a broker, factor, or by some other name. The thing that fixes his duty and responsibility is the character of the service which he undertakes to perform and not the style or the name under which he does business. Usage or custom, however long continued, does not warrant unfaithful, disloyal conduct on the part of an agent. Such conduct is abhorrent to the letter and spirit of the law and cannot be justified under its forms.

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Upon the undisputed facts in this case the plaintiff made the agent of the lessees his agent without the knowledge or consent of the lessees. While the plaintiff had no guilty intent or fraudulent purpose, his act operated nevertheless as a fraud upon the lessees. 1 Black, Rescission and Cancellation, § 34, and cases cited.

It follows from what has been said that upon the discovery of the fraudulent conduct of their agent the lessees had a right to rescind and repudiate the contract, but the law requires, under such circumstances, that the lessees should act without unnecessary delay and with due promptness. This brings us to the most serious question in this case.

An application for the cancellation or rescission of a contract is addressed to the sound discretion of a court of equity. *Stimpson v. Stimpson,* 168 Wis. 146, 169 N. W. 295. The trial court found that, after having knowledge of the fraud, the lessees continued to exercise acts of ownership over the premises described in the lease and elected to retain the lease and waive their rights, if any they had, to cancellation. This finding of the trial court, more fully set out in the statement of facts, is a mixed conclusion of fact and law. We are not told at what time or times the lessees received such knowledge, or what act or acts upon their part constituted a waiver or election. As has been stated many times, this court will not overturn findings of the trial court unless they are against the clear preponderance or the great weight of the evidence. This rule, however, does not apply to findings which are general in their nature. *Damman v. Damman,* 145 Wis. 122, 128 N. W. 1062. See, also, *Harrigan v. Gilchrist,* 121 Wis. 127 (99 N. W. 909), at p. 312 *et seq.;* and *McMillen v. Strange,* 159 Wis. 271, 150 N. W. 434.

The question of whether or not there was a waiver or an election was put sharply in issue by the pleadings and was thoroughly litigated upon the trial. On behalf of the

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plaintiff it is contended that the lessees at all times knew that a commission was to be paid by the plaintiff to McClure and Harvey. In that respect it is claimed that while on a train between Milwaukee and Chicago in October, 1911, Hyatt told *Carrow, Hayes,* and their attorney that Harvey and McClure were receiving a commission. He says he told them in the following language, in response to a question from *Carrow,* "Why, McClure can tell you about that;" and McClure said, "Yes, we are receiving a small part of the commission given the Milwaukee brokers, which, however, will not pay our expenses." He does not say that any information was given as to who was paying the commission, or any information as to the amount of it or when it was to be paid. Hyatt is the only one who testifies to this conversation. He relates circumstances in connection with it which, as conclusively shown by other evidence, could not have occurred. After a careful examination of the record we are of the opinion that Hyatt's testimony as to this transaction, even if worthy of belief, is insufficient to bring home to the lessees knowledge of the true situation. It is thoroughly discredited. McClure attempts to corroborate it, but admits that his recollection is hazy, due to the number of cocktails which he had consumed. His corroboration is of very little if any value. In addition to that, the conduct of the parties subsequent to the time is wholly inconsistent with any knowledge on their part of the true nature of the transaction, and their suspicions were apparently not aroused in any way. Contrasted with their conduct after they admittedly had full knowledge, their lack of objection is a very convincing circumstance that they received no notice and were not put upon inquiry at that time.

On behalf of the plaintiff it is argued that late in 1913 or early in 1914 the attention of *Carrow* and *Guy H. McFall* was expressly called to the fact that the plaintiff had paid a commission to Harvey and McClure. Evidence as to this

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transaction rests entirely upon the evidence of Hyatt, but in his testimony Hyatt describes circumstances which show conclusively that at the time he arrived in the office where the interview took place the lessees were in possession of full information. Upon his arrival there he was charged with wrongful conduct, advised that had the lessees known of the payment of the commission they would not have entered into the deal, and he describes the session as a "stormy interview." From a careful examination of the record we are convinced that the testimony of Hyatt relates to an interview some time after the lessees had acquired knowledge as to the payment of the commission.

It is claimed that the defendant *Hayes* should have been put upon inquiry by a remark made by Remeeus to *Hayes* in response to a suggestion made by *Hayes* that no one but Remeeus seemed to be taking any interest in the property. Remeeus is said to have replied, "The probable reason is that the other brokers received their commission; mine is still in jeopardy." If this statement were taken at its face value it would not apprise the defendant of the real facts and circumstances connected with this transaction. It is to be remembered that Remeeus was at this time endeavoring to make an arrangement with *Hayes* so that the taxes would be paid, in order that Remeeus might collect the notes given by *Weinhagen,* which were conditioned upon payment of the taxes. It is not very probable that he would have made statements to *Hayes* which would have tended to arouse the suspicion of *Hayes* as to the legality of the entire transaction.

It is admitted that on July 28, 1916, Remeeus wrote to *Carrow* giving him full information as to the payment of the commission, and it further appears that a short time previous to the writing of this letter Remeeus had a conversation with *Carrow* to the same effect.

After a careful examination of the evidence we are brought to the conclusion that the evidence does not sustain

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a finding that the lessees had knowledge of the payment of the commission or of facts which should have put them upon inquiry previous to July, 1916.

There is evidence in the record which it is claimed sustains the finding to the contrary, such as an intimation in a letter from McClure to *Carrow,* in which McClure says that his integrity has been questioned; but the correspondence shows that this complaint relates to McClure's failure to carry out the terms of the contract by which Harvey and McClure were to look after and care for his property. There are also some statements made in the depositions which relate to time, but a reading of the testimony convinces us that the circumstances recited indicate that the witnesses were, as they subsequently claim, mistaken as to the time. The whole correspondence and course of dealing between the parties indicate very strongly and conclusively that the lessees did not have knowledge of the wrongful conduct of their agents until July, 1916. We shall not attempt to recite all of the circumstances which lead us to that conclusion.

It is argued very forcefully on behalf of the plaintiff that after receiving the letter of Remeeus in July, 1916, the lessees deliberately elected to continue as the owners of the leasehold estate, and thereby waived their right of rescission. In the letter of July 28, 1916, Remeeus wrote to one of the lessees:

"Right here let me state that this commission was paid as follows: Schenck received $3,000; Hyatt $2,000; Harvey-McClure Co. $2,000; myself and another Milwaukee broker the other $2,000."

It seems that a broker by the name of Wheeler brought the parties together and was considered entitled to a part of the commission, but his conduct has no relation to the matters here involved.

On July 25th the plaintiff's attorney had written a letter to *Carrow.* In reply to this letter *Carrow* states the fact

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in regard to the payment of the commission, expressed the dissatisfaction of himself and his associates with it, relates the financial difficulties in which the lessees found themselves, and explains why payments have not been made, and then says:

"We should judge from this offer that the impression has gained ground that it is owing to a lack of faith in the property rather than a lack of funds that we have allowed the taxes and other matters to go unpaid. This is absolutely not the case. . . . The reason these payments were not made was for lack of funds to meet them; neither have we any now."

In the closing paragraph of the letter *Carrow* says:

"While, of course, these particular things with which we have had to contend does not interest *Mr. Weinhagen,* it is simply in the way of explanation of the reason we have been unable to make these payments, and which puts us in a position at this time of not being able to consider *Mr. Weinhagen's* offer, as we know no way in which these funds can at present be raised."

This explanation of why they had not performed their contract cannot be construed into an election to waive the fraud and continue with the contract. There was some correspondence with *Hayes,* between *Hayes* and Harvey, in which *Hayes* referred to the commission, but we do not perceive what bearing this can have upon the question of an election by the lessees to waive the fraud of their agents.

There is evidence in the record tending to show also that they made efforts to dispose of the property. While of course this is a circumstance bearing upon the question of whether or not they intended to waive the fraud, standing by itself it is by no means conclusive. Smith, Fraud, § 136. Nothing further seems to have been done until after the commencement of this suit, which was begun November 25, 1916. After the commencement of the suit there were further efforts to find a purchaser, and Remeeus twice suggested prospective methods of financing the project.

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The facts as to the conduct of *Hayes* and his associates after being fully apprised in reference to the fraudulent acts of their agents are practically undisputed. Whether or not their conduct constituted a waiver is therefore a question of law. *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476. There is no claim that the conduct of the defendants created an estoppel *in pais.* The plaintiff did nothing in reliance upon their conduct or in any way changed his position in reference to the subject matter of the controversy.

The situation in which the defendants found themselves when they discovered the fraud of their agents had existed for nearly five years. They had incurred large obligations outside of and beyond the contract obligations arising out of the lease; they had expended considerable sums of money; and those upon whom they had relied had betrayed their confidence; and they no doubt were at a loss to know where to turn or what to do. Their effort to find a purchaser and inability to do so was probably a natural factor in their final decision. A rescission of the contract would not place them *in statu quo,* and their failure to act more promptly under such circumstances cannot be held to constitute a waiver of their right of rescission. They delayed from about the middle of July until November, and did nothing which showed any intent on their part either to waive the fraud or to rescind the contract, and unless they are barred by lapse of time, or unless their failure to act of itself amounts to a waiver, they had at the time the suit was begun the right of election. As was said in *Swedish American Nat. Bank v. Koebernick,* 136 Wis. 473, 479, 117 N. W. 1020:

"A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it."

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In this case no situation arose subsequent to and before the commencement of this action which required the defendants to act, and they did nothing which indicated in any positive way that they had determined upon the one course or the other. An inference of intent to waive does not readily arise where the situation in which the party required to elect finds himself is the result of the opposite party's fraud or misconduct. *Ketchum v. Wells,* 19 Wis. 25; 40 Cyc. 259, par. 2, and cases cited.

There being no positive affirmative act indicating that the defendants intended to waive their right of rescission during the period which intervened between their receiving actual notice in July and the commencement of this action, we are of the opinion that mere delay under such circumstances did not amount to an election or an affirmance of the contract or a waiver of the right of rescission. While we recognize the distinction between waiver and estoppel *in pais* and that we are here considering mere waiver, nevertheless the fact that the parties stand in exactly the same situation now as they would have stood had the defendants made their election the next day after receiving full information is a matter worthy of consideration. No circumstances arose which required them to choose, and they did not choose. Mere delay did not amount to a waiver of their rights. *Ellis v. Southwestern L. Co.* 102 Wis. 400, 78 N. W. 747; *Knowlton v. Walker,* 13 Wis. 264; *Cedar Lake H. Co. v. Cedar Creek H. Co.* 79 Wis. 297, 48 N. W. 371; 2 Black, Rescission and Cancellation, § 546, and cases cited.

It is further contended that the matter was concluded in the receivership proceedings and is no longer open to investigation. We do not regard this contention as sound. The validity of the contract or the defendants' right of rescission was in no way drawn in question in that proceeding. In fact, the circumstances upon which the right of rescission is based were then unknown to the defendants.

The conclusion at which we have arrived makes it un-

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necessary to consider the extent of the revivor of the action as against the estate of Eugene McFall. The principal contract having been rescinded, the obligation of the bondsmen, which in no way guaranteed the genuineness of the original contract, falls with it, and not only the lessees, but the parties to the bond, are discharged from further liability or obligation under its terms.

Our conclusion being that the lease should be canceled, it follows that the parties to the transaction should so far as possible be placed *in statu quo,* and to this relief the defendants are entitled under their counterclaim or cross-complaint. There should be an accounting between the parties, but in this accounting the plaintiff should not be chargeable with any losses, expense, or diminution of receipts due to the defaults, negligence, or mismanagement of the defendants.

Neither are the defendants entitled to have or receive, upon a rescission of the contract, any part of the amount paid by the plaintiff as commissions. Having elected to rescind the contract and to be placed *in statu quo,* they can certainly have no claim upon the money paid by the plaintiff.

As a condition of this relief the defendants are of course required to place the plaintiff *in statu quo* as to the property, and they should therefore release or procure a release of all rights as against the property which exist in, by, through, or under them.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law and in accordance with this opinion; the defendants to recover one bill of costs in this court.

The following opinion was filed August 5, 1920:

SIEBECKER, J. (*dissenting*). I cannot concur in the decision of the court. The record, in my opinion, sustains the trial court in its finding to the effect that the appellants,

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after having knowledge of the payment by the plaintiff of a commission to the defendants Harvey and McClure and of their paying a part thereof to Clark C. Hyatt, continued to exercise acts of ownership of the property under the lease and elected to build and assert the interest of the lessee and retain the benefit thereof, and thereby waived their rights, if they had any, to have the lease or bond canceled.

I am authorized to say that Mr. Justice VINJE concurs in this dissent.

On November 16, 1920, a motion by the respondent for a rehearing was granted, and the cause was reargued on January 15, 1921.

The following opinion was filed May 31, 1921:

ROSENBERRY, J. Mr. Chief Justice WINSLOW and Mr. Justice KERWIN took no part in the consideration of this case at the time it was submitted. The opinion of the court was filed July 3, 1920, three of the Justices concurring in the decision and two dissenting. A motion for a rehearing was made. The motion was considered and a rehearing granted and the cause was again fully argued before the court, all Justices sitting. Before the matter was considered in conference Mr. Justice KERWIN died. When the case was taken up the court was equally divided upon the questions involved. The case being an important one by reason of the amount and legal principles involved, further consideration was postponed until such time as the vacancy created by the death of Mr. Justice KERWIN should be filled. Upon the appointment of Mr. Justice DOERFLER the entire matter was again reconsidered by the whole court. Upon such reconsideration the court is of the opinion that the conclusion reached and announced in the opinion filed should not be disturbed, largely for the reasons therein stated. The situ-

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ation is such, however, that we deem it advisable to state briefly the grounds upon which our final conclusion rests.

Upon the rehearing two principal questions were considered. First, whether the plaintiff was chargeable with the knowledge which his agent, Schenck, had as to the material facts in relation to the negotiations and the parties thereto; and second, whether the twelfth finding made by the trial court was sustained by the evidence, and, if so, whether or not the subsequent conduct of the lessees amounted to a waiver of their right of rescission.

In connection with the first proposition some criticism is made of a statement contained in the opinion that "It taxes human credulity to believe that under such circumstances Schenck [the agent] did not know that McClure and Harvey represented the proposed lessee." We have again examined the testimony of Mr. Schenck upon this point, and while it does not appear that he knew the names of those who subsequently became the lessees, he must have known, or at least is chargeable as a matter of law with knowledge of the fact, that they represented an undisclosed principal, for at no time did they pretend that they were negotiating in their own behalf. They must have been negotiating in behalf of some principal, and it may be, as contended, that Mr. Schenck did not have knowledge of the fact that the present lessees were the principals; but he is chargeable, as a matter of law, with knowledge of the fact that they were representing a third party. It is further contended that Schenck's agency was of a very limited scope. In his reply to the cross-complaint the plaintiff alleged:

"That there was in the employ of this plaintiff a real-estate agent by the name of Otto J. Schenck, to generally look after said real estate, collect the rents therefrom, taking care of the same for this plaintiff, and that this plaintiff let it be known to the said Otto J. Schenck that he would entertain a proposition to lease said real estate upon long-term

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lease, provided suitable and responsible parties could be found who would be willing to lease the same, and at such rental as this plaintiff would be willing to accept as a condition of entering into said lease."

Plaintiff further alleged that:

"Accordingly, during the summer of 1911, certain persons, who were unknown to this plaintiff, approached the said Otto J. Schenck, who was at that time acting as the agent for this plaintiff, and informed the said Otto J. Schenck, as this plaintiff is informed and believes, that they, the said persons at that time unknown to this plaintiff, had a person who was ready and willing to lease said real estate so owned by the said plaintiff. . . . That this plaintiff did not personally conduct any of the negotiations with either of said persons, but that said negotiations were carried on by the said Otto J. Schenck as his agent, and that neither this plaintiff nor the said Otto J. Schenck had any knowledge or information until shortly prior to the execution of said lease that the said defendant *H. J. Hayes* was the person who was to become the lessee."

These allegations of the plaintiff's reply have not been withdrawn or modified, and the court is unanimously of the opinion that these allegations, taken in connection with the facts and circumstances shown by the evidence, conclusively establish that Schenck was the agent of the plaintiff, empowered to negotiate in respect to the terms of the lease, and furthermore, that Schenck had knowledge of the fact that the persons (Harvey and McClure) who approached him were representing third parties, and that the plaintiff is therefore chargeable with knowledge of the facts which came to the attention of his agent, Schenck, in the course of the negotiations.

By the finding of fact numbered 12 the trial court found:

"That after having knowledge (before the commencement of this action) of the payment by the plaintiff of the moneys aforesaid to the defendants Harvey and McClure, and of the payment by said Harvey and McClure of a part

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thereof to said Clark C. Hyatt, the defendants *H. J. Hayes, H. P. Carrow, Guy H. McFall,* and R. A. Bartholomew continued to exercise acts of ownership of said premises under and by virtue of the lease and elected to hold and assert the interest of the lessee therein, and have by their conduct since obtaining such knowledge waived their rights, if any they ever had, to have said lease or bond canceled, and have elected to retain said lease and the benefits thereof."

In consideration of the question whether this finding is sustained by the evidence, the court has given full effect to the established rule that a finding of the trial court upon questions of fact will not be reversed unless it is against the clear preponderance or great weight of the evidence. It is conceded on both sides that on or about July 28, 1916, the lessees were fully informed in regard to the payment of a commission to their agents, Harvey, McClure, and Hyatt. The finding of the trial court to the effect that they had knowledge of such payment before the commencement of the action is therefore sustained. The question then arises whether or not they had knowledge of the payment of a commission to their agents prior to that time. It is claimed by the plaintiff that such knowledge was brought home to the lessees in October, 1911, and again late in 1913 or early in 1914. As pointed out in the original opinion, the finding of the court as to the time when knowledge was brought home to the plaintiff is a general finding, being to the effect that it was some time prior to the commencement of the suit. Such a finding may well rest wholly upon the undisputed fact that they had such knowledge in July, 1916. Whether or not they had such knowledge prior to that time, as now contended by the plaintiff, can only be ascertained by an examination of the evidence, unaided by any finding of the trial court in that respect. We have again carefully reviewed the evidence, and the court is of the opinion that it clearly preponderates against plaintiff's contentions. If

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the testimony be given its full weight, the facts brought to the attention of the lessees were not sufficient to arouse a suspicion in the minds of the lessees, who had fully trusted Harvey, McClure, and Hyatt, who were not only their agents but their personal friends, in the negotiations of an important business deal. Considered in connection with all the evidence, the testimony relied upon by plaintiff is highly improbable and not at all convincing. It was not sufficient to put the lessees upon inquiry and was wholly lacking in that definiteness necessary to charge them with knowledge of the essential facts.

There remains then the question, Did the lessees by their conduct after July, 1916, elect to retain the lease and the benefits thereof? The facts being undisputed, the question of whether their conduct after that date amounted to an election is a question of law. The real question is whether or not, under the established facts, in the exercise of a sound discretion, a court of equity should grant relief to the lessees who were admittedly the victims of an insidious fraud. For the reasons stated in the original opinion, the court considers that such relief should be granted. The original mandate is approved.

SIEBECKER, C. J., and VINJE and JONES, JJ., dissent.

On July 13, 1921, the following order was entered by the court:

The motion herein on behalf of the respondent, filed June 8, 1921, while in terms a motion to modify the mandate, is in fact and substance a motion for a rehearing of a decision made on rehearing and cannot therefore be entertained. The motion papers are stricken from the files and the clerk is directed to remit the record forthwith.

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SUPERIOR WATER, LIGHT & POWER COMPANY, Respondent, vs. CITY OF SUPERIOR and others, Appellants.

June 4, 1920—January 11, 1921.
May 7—May 31, 1921.

Municipal corporations: Ordinances: Amendment: Merger: Waterworks system: Acquisition by municipality: Eminent domain: Condemnation: Valuation of property: Specific performance: Franchise of corporation: Nature and kinds: Control by state: Reserved power: Lands without the state: Power of municipality to acquire: Compelling conveyance of entire property of corporation.

1. An amendment to a city ordinance which grants a franchise to a water company is merged in and becomes a part of such ordinance, and stands on no different footing with reference to the power of the state to assert its authority in respect thereto than any other provision contained in the ordinance.
2. A city in proceeding to acquire the property of a water company under the power of eminent domain is exercising the sovereignty of the state, which cannot be bartered away by a municipal ordinance or in any other manner.
3. In a state law embodying a comprehensive plan for the regulation and control of public-service corporations and for the acquirement of their property in given cases by municipalities, the method provided for valuing such property with a view of awarding just compensation therefor is paramount to and exclusive of that contained in a city ordinance for determining such valuation; especially in the absence of allegation in the complaint that such method will not afford just compensation.
4. In a proceeding by a city to acquire the property of a water company under the power of eminent domain, if the method of valuation of such property provided for in an ordinance of the city is productive of unconscionable results and will result in an excessive valuation, then it will be considered whether a court of equity should, in the exercise of its discretion, invoke its power to decree a specific performance.

[5. Whether the performance by a city of an alleged contract with a public-service corporation is excused on the ground that the state has withdrawn from the city the power to perform it, not decided.]

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6. An ordinance of the common council of a city granting to a public-service corporation certain rights, powers, and privileges constitutes a legislative franchise emanating from the state to such corporation; the common council merely acts as the agent of the state, and the privileges conferred by such ordinance are as much a legislative franchise as if it had been granted by an act of the legislature.
7. In such case, if the corporation fails to comply with the requirements of the ordinance, or fails to perform any of the duties imposed upon it by the terms thereof, the state may maintain proceedings to vacate its charter or forfeit the franchise; and the state has the same right and authority to interefere therewith, change or alter the same as though it were granted directly by the legislature.
8. The power reserved to the state in sec. 1, art. XI, of its constitution to alter or repeal all general or special acts at any time after their passage, extends and applies to the franchise to *be* a corporation as well as to the franchise *of* a corporation, and the right under such reserved power "to withdraw a franchise must authorize a withdrawal of every and any right or privilege which is a part of such franchise." (Certain language in opinions of MARSHALL, J., to the contrary, disapproved.)

On rehearing:

9. A proceeding by a city to acquire a waterworks plant under the public utilities law is in the nature of condemnation proceedings even where the water company has voluntarily accepted an indeterminate permit, in view of sub. 4, sec. 1797*m*—79, Stats.
10. The state cannot condemn property beyond its borders and over which it exercises no jurisdiction whatever.
11. The franchise of a public utility corporation and the property devoted by it to the performance of the duties imposed on it by the franchise constitute an entirety, and the property, neither in its entirety nor in parcels, can be separated from the franchise; and, since the franchise is deemed the principal thing and is an incorporeal hereditament, the entire property assumes the character of personalty.
12. The city can acquire title to the entire plant, though a portion of the intake pipe extended beyond the boundaries of the state, since the entire property of a water company used in the discharge of the duties imposed upon it by the franchise, together with such franchise, constitute an entirety partaking of the nature of personal property, and hence such portion of the plant as was physically located beyond the borders of

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the state could be purchased as personal property, having a situs within the state; and equity has ample power to compel the water company to convey such portion.

13. The franchise of a water company to supply water to a city and its inhabitants is a contract between the company and the state.

14. A city may acquire title to a waterworks plant a part of which crosses the border of the state into another state, since in so doing it operates in its proprietary and not in its governmental capacity.

APPEAL from an order of the circuit court for Douglas county: JAMES WICKHAM, Judge. *Reversed.*

Action to enjoin the city of *Superior* and its officers from proceeding under the provisions of secs. 1797*m*—1 to 1797*m*—109, Stats., to acquire the waterworks and property of the plaintiff, and compelling the city to compensate the plaintiff for its property according to the provisions of a certain ordinance of the city of *Superior* granting to the plaintiff a franchise to build, operate, and maintain waterworks in said city. From an order overruling a demurrer to the complaint the defendants appealed.

The complaint shows that the Superior Water Works Company (hereinafter referred to as the *Water Company*) was incorporated by ch. 359 of the private and local laws of Wisconsin for the year 1866. By the terms of the act it was provided that said company may, for the purpose of supplying the town of Superior and its neighborhood with pure water, "enter upon any lands, streets, highways, roads, lanes or public squares through which they may deem it proper to carry the water so taken, and lay, construct, repair and replace any pipes, conduits, hydrants, jets, fountains," etc., and that "the said company may make any agreements, contracts, grants and leases for the sale, use and distribution of water as may be agreed upon between said company and any person or persons, associations and corporations, and with the town of Superior, or neighboring

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towns; or the said company itself may take and use the surplus water for manufacturing and other purposes; which said agreements, contracts, grants and leases shall be valid and effectual in law."

On the 15th day of October, 1887, the village of Superior was a duly incorporated village under the laws of the state of Wisconsin. On that date the village board of the village of Superior, for the purpose of providing for the protection of public and private property in said village against fire and supplying the inhabitants thereof with water for domestic and public uses, passed an ordinance granting to the Superior Water Works Company the privilege of establishing, maintaining, and operating a system of waterworks in said city, in and by the terms of which it was provided that the said village of Superior grant to no other party or parties a similar franchise for the period of thirty years, and that "at the expiration of the said thirty years, should said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks for another term of thirty years, upon the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company, at the expiration of the first thirty years, in and upon the public grounds and streets of said village, and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case, the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of waterworks, and the property connected therewith, at a fair valuation as provided for in sec. 13."

By sec. 13 it was provided that the city might purchase and the company bound itself to sell its property, franchises, etc., to the city at the expiration of ten years from the passage of the ordinance, and at intervals of five years thereafter, in which case the village and the company were

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each to select an appraiser, the two to select a third, who should determine the value of the said waterworks; their valuation to constitute the purchase price to be paid therefor.

It was provided that the main source of water supply should be the Bay of Superior, and that the water should be filtered through a sand-filled crib, and then by an additional process of mechanical filtration, either by the "Hyatt System" or some other system of filtration giving equally pure water. "It being agreed that the water so filtered is to be pure and wholesome and suitable for both public and domestic use." It was also provided that if the said village of Superior shall procure for the said Superior Water Works Company without cost or expense to said company the valid and indefeasible right to extend and lay its pipes across the said Bay of Superior and across Minnesota Point to the shores of and into Lake Superior on and along the shortest line from the location of its pumping station to the shores of said lake, the said Superior Water Works Company shall, within one year after receiving notice of the acquirement of said right of way, extend its pipes into Lake Superior and take the supply of water therefrom.

On March 25, 1889, the territory constituting the village of Superior was incorporated into the city of *Superior* under the laws of Wisconsin for the year 1889. On November 1, 1889, said Superior Water Works Company sold, assigned, transferred, and conveyed to the plaintiff, *Superior Water, Light & Power Company,* its said waterworks system and all its property, real and personal, and all its rights under the ordinances of the village or city of *Superior.* On October 1, 1889, the city council of the city of *Superior* passed and adopted the following ordinance:

"Section I. Ordinance number 5 of the general ordinances of the village (now city) of *Superior,* entitled 'An ordinance amending and re-enacting section 13 of an ordinance authorizing the Superior Water Works Company, its suc-

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cessors or assigns, to construct, operate and maintain a system of waterworks in the village of Superior, Douglas county, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers,' is hereby amended by striking out of said ordinance all of said ordinance after the words 'section 13,' where the said words 'section 13' occur, in the thirteenth line thereof, and inserting in lieu thereof the following:

"This ordinance is passed upon the express condition that at the expiration of twenty years after the date of the passage of this ordinance and of every fifth year thereafter, the city of *Superior* may, at its option, purchase from the said Superior Water Works Company, its successors or assigns, the entire plant of the said Superior Water Works Company, its successors or assigns, and including all franchises theretofore granted to said Superior Water Works Company, its successors or assigns, by the village or city of *Superior,* by paying therefor, in cash, an amount of money of which the net earnings of said Superior Water Works Company, for the year next preceding the purchase thereof, by said city, shall be five per centum. Such purchase shall be made in the following manner, to wit: The common council at its first regular meeting after the expiration of said twenty years, or of any fifth year thereafter, may pass an ordinance declaring its intention to purchase said plant and franchises, appropriating the necessary funds therefor; and directing the city clerk of said city to serve upon said Superior Water Works Company, its successors or assigns, a copy of said ordinance, together with a notice that at the expiration of one year from the date of the service of said notice the said city will pay to said Superior Water Works Company, its successors or assigns, the price of said plant and franchises, determined as by this ordinance provided, and will assume possession of said plant and franchises. Commencing with the day following the date of the service of such notice, the said Superior Water Works Company, its successors or assigns, shall keep an accurate account of all receipts and disbursements of said company, in a set of books kept expressly for that purpose and for no other, which said books shall, at the expiration of each

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quarter year thereafter, be open to the inspection of the city comptroller of said city. At the expiration of one year from the date of the service of the notice above provided for, the said Superior Water Works Company, its successors or assigns, shall submit to the comptroller of said city the said books of account, and the price to be paid for said plant and franchises shall be determined therefrom, as hereinbefore provided, and upon the payment, in full, of said price, the said Superior Water Works Company, its successors or assigns, shall surrender to said city its said plant and franchises complete. The words 'net earnings,' as used in this ordinance, shall mean the gross earnings of said waterworks, less the actual operating expenses thereof.

"Section II. This ordinance is passed upon the consideration to the city of *Superior* that the said city is hereby released and relieved from the duty, cost and expense of procuring, for said Superior Water Works Company, the valid and indefeasible right to extend and lay its pipes across the Bay of Superior and across Minnesota Point, to the shores of and into Lake Superior, as provided in section 2 of said ordinance number one of the general ordinances of the village of Superior, and that all that part of said section No. 2, commencing with the word 'provided' in the twentieth line thereof, down to and including the word 'completed' in the sixty-second line thereof, is hereby repealed. And this said ordinance is passed upon the further consideration to the city of *Superior,* that by the acceptance hereof the said Superior Water Works Company binds itself, its successors and assigns, to obtain at its own expense an adequate supply of good and wholesome water for domestic and public purposes from said Lake Superior and to furnish the same to the inhabitants of said city and to said city as provided in said ordinance number one as hereby amended within two years from the acceptance of this ordinance by said Superior Water Works Company.

"Section III. This ordinance is passed with the consent of the Superior Water Works Company, and upon filing a written acceptance by it with the city clerk of the said city of *Superior* the said ordinance with all other ordinances of said city or the village of Superior granting to the said Superior Water Works Company any rights or franchises

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shall be and become and is hereby made a binding contract as so amended and modified."

It is alleged in the complaint that the franchise of the plaintiff expired on October 15, 1917, and thereupon it became and was the duty of the city of *Superior* to purchase the said waterworks system and the property connected therewith from this plaintiff pursuant to the provisions of its franchise-ordinance, as set forth in the statement of facts herein, unless the city of *Superior* should elect to grant to said plaintiff the right to continue and maintain said system of waterworks for another term of thirty years under the same terms and conditions as existed on said October 15, 1917, between the said city of *Superior* and the plaintiff; that the plaintiff requested the mayor and council of said city to determine whether said city would purchase said waterworks system or would exercise its election to renew said franchise, and that thereupon the mayor and council wholly repudiated the obligation of said city to purchase said waterworks system under the provisions of the ordinance or franchise, and denied the existence and validity of the contract on the part of the city to purchase as aforesaid, and began proceedings under the provisions of the public utility law, secs. 1797*m*—1 to 1797*m*—109 of the Wisconsin Statutes, to acquire the said waterworks system, together with other property of this plaintiff, and on October 8, 1918, the mayor and council of said city passed and adopted a resolution declaring the intention and determination of said city to condemn, purchase, and take over the plants, equipments, and properties of the plaintiff and directing the calling and holding of a special election thereon and the taking of the necessary action and proceedings therefor; that said election was held, and a majority of the votes cast were in favor of acquiring said plant under the provisions of said public utility law.

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For the appellants there was a brief by *T. L. McIntosh,* and oral argument by *Mr. McIntosh* and *Mr. Louis Hanitch,* both of Superior.

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, attorneys, and a separate brief by *Harry L. Butler* of Madison, of counsel; and the cause was argued orally by *Mr. Butler* and *Mr. C. R. Fridley.*

The following opinion was filed January 11, 1921:

OWEN, J. The complaint discloses the fact that the city of *Superior* has determined to take over the plant, property, and equipment of the *Water Company,* and the real question in controversy is whether the compensation to be paid by the city is to be determined in the manner provided in the franchise-ordinance or pursuant to the provisions of the public utility laws, secs. 1797*m*—1 to 1797*m*—109, Stats.

The original franchise was granted by the village of Superior to the Superior Water Works Company, plaintiff's assignor, by an ordinance passed and adopted October 15, 1887. In and by the terms of that ordinance it was provided that "should said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks for another term of thirty years, upon the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company, at the expiration of the first thirty years, in and upon the public grounds and streets of said village, and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of waterworks, and the property connected therewith, at a fair valuation as provided in sec. 13."

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Sec. 13 provided, in a comprehensive way, for the appraisal of the property of the waterworks company by three appraisers, in the event that the city should exercise any of the various options reserved to it in the franchise-ordinance to purchase the plant. The water supply was to be taken from the Bay of Superior. The *Water Company* was required to filter the water through a sand-filled crib, and then by an additional process of mechanical filtration, either by the "Hyatt System" or some other system of filtration giving equally pure water. It was also provided that if the said village "shall procure for the said Superior Water Works Company without cost or expense to said company the valid and indefeasible right to extend and lay its pipes across the said Bay of Superior and across Minnesota Point to the shores of and into Lake Superior," the said *Water Company* shall extend its pipes into Lake Superior and take therefrom the supply of water for the said village.

After the incorporation of the city of *Superior* this franchise-ordinance was amended by an ordinance passed and adopted by the common council of the city of *Superior* under date of October 1, 1889, set forth in the statement of facts. This ordinance released and relieved the city of *Superior* from the duty of procuring the right of way across Minnesota Point in order to enable the *Water Company* to extend its pipes and mains into Lake Superior, and bound the *Water Company* to obtain at its own expense an adequate supply of good and wholesome water from said lake. It also amended sec. 13 so as to provide that, in case of the taking over of the plant, property, and equipment of the *Water Company,* the city should pay therefor an amount of which the net earnings of said *Water Company* for the year next preceding the purchase thereof by said city shall be five per centum, to be determined in the manner provided in and by the terms of the amending ordinance.

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It is earnestly contended by respondent that this ordinance constitutes a contract, entered into by the city in its proprietary capacity, which is immune from subsequent legislative interference. An orderly consideration of the issues presented requires that we first determine the character and effect of this ordinance. It is to be noted that it was adopted as an amendment to the original franchise-ordinance. True, there was an exchange of equivalents between the city and the *Water Company,* inducing the consent of both parties to the amendment. The *Water Company* was relieved of the necessity of maintaining filtration plants; the city was relieved of its obligation to procure the right of way across Minnesota Point; and a different method was provided for determining the amount which the city was to pay for the plant in case it should exercise its option to buy the same. For aught that appears in the complaint, this might have resulted to the advantage of either party, or that advantage might have rested entirely in a simple and definite method of fixing the amount of the purchase price.

The effect of this ordinance was to amend the original franchise-ordinance. Thereafter, the franchise of the *Water Company* was evidenced by the original franchise-ordinance of the village of Superior, as amended by the ordinance of October 1, 1889. Thereafter, the franchise of the *Water Company* provided that in case of the purchase by the city of the plant, property, and equipment of the *Water Company* the city should pay compensation therefor to be determined in the manner provided in the franchise, which was the manner provided for in the amendment.

"When an amendment to a statute is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, namely, the statute as amended." Black, Interp. of Laws (2d ed.) 574. The amendatory ordinance was merged in and became a part of the original franchise, and the right of the *Water Com-*

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pany to insist that its property shall be valued as therein provided is no greater than if the method had remained as originally provided therein. This particular feature of the *Water Company's* franchise, therefore, stands on no different footing with reference to the power of the state to interfere therewith than any other provision contained in the ordinance.

It is well settled in this state that an ordinance of this kind constitutes a legislative franchise emanating from the state to the corporation. The common council acts as the agent of the state, and the privileges conferred by its ordinance are as much a legislative franchise as if it had been granted by an act of the legislature. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326; *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697. And in case the corporation fails to comply with the requirements of the ordinance, or fails to perform any of the duties imposed upon it by the terms thereof, the state may maintain proceedings to vacate its charter or forfeit the franchise. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697. The franchise granted to the Superior Water Works Company, therefore, was a legislative franchise granted by the state, and the state has the same right and authority to interfere therewith, change or alter the same, as though it were granted directly by the legislature, as in the case of *State v. Milwaukee G. L. Co.* 29 Wis. 454.

We now come to consider the question of the effect of the enactment of the public utility law (secs. 1797*m*—1 to 1797*m*—109, Stats.) upon respondent's franchise. That law was originally enacted by ch. 499 of the Laws of 1907.

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By its terms, any public utility, as therein defined, was authorized to surrender its then existing franchise and take in lieu thereof a franchise under the public utility law, called an indeterminate permit. This indeterminate permit was subject to the provisions of the public utility law, which in effect thereafter constituted its charter. The respondent did not act under the optional provision of this law, did not surrender its franchise, and did not accept the indeterminate permit provided for by the public utility law. By ch. 596 of the Laws of 1911 this optional feature of the public utility law was made mandatory, and it provided that every license, permit, or franchise granted to a public utility prior to July 11, 1907, is so altered and amended as to constitute and to be an indeterminate permit within the meaning of that law. The act also grants to any municipality power to acquire by condemnation any public utility in the manner therein prescribed, and it is under and by virtue of such provisions that the city is proceeding for the acquirement of the plant, property, and equipment of the respondent.

Respondent contends that the legislature had no power to arbitrarily deprive it of the franchise conferred upon it by the village and city ordinances heretofore mentioned, and that, not having voluntarily submitted to the provisions of the public utility law, it is not bound thereby. The public utility law has been under consideration by this court a number of times (*Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *Kenosha v. Kenosha Home Tel. Co.* 149 Wis. 338, 135 N. W. 848) and declared valid in the light of the objections there raised to its validity. In none of those cases, however, was the question presented of the power of the legislature to substitute the public utility law in lieu of a local municipal franchise against the consent of the public utility. In each of those cases the public utility had voluntarily surrendered its existing franchise and taken in lieu thereof the indeterminate

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permit and submitted itself to the provisions of the public utility law. The question here raised, therefore, as to the power of the legislature to compel the substitution of the public utility law for the existing franchise against the consent of the public utility, confronts us as an original proposition.

Concededly the power of the state to work this substitution of franchises rests upon the reserved power of the constitution, found in sec. 1, art. XI, which reads as follows:

"Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Respondent contends that this provision of the constitution has no application to the ordinance constituting its franchise, and that it does not confer power upon the legislature to alter or amend the same. Its contention is that the only general laws or special acts which could be enacted under the provisions of this section are those under which a corporation is formed or created, hence it is only laws for the formation of corporations which may be altered or repealed. Counsel points a distinction between what he calls a corporate franchise, that is, a franchise granting corporate existence and which is not the property of the corporation, and a franchise acquired by a corporation after corporate existence commenced, that it may part with or be deprived of without affecting its corporate existence and which may survive the death of the corporation. As we shall have occasion frequently to refer to these different classes of franchises as we proceed, we shall, for brevity, refer to the former as the primary, and to the latter as the

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secondary, franchise of a corporation. We shall refer to the power to alter or repeal, mentioned in sec. 1, art. XI, Const., as the reserved power.

Counsel for respondent rests his contention that this reserved power is limited to the alteration or repeal of the primary franchise of a corporation upon a consideration and analysis of the literal terms of sec. 1, art. XI. While we are not disposed to disparage or question the legitimacy of counsel's logic, we must decline to follow him into an inviting field of inquiry. We think the time has long since passed when the consideration of this clause in this respect may be considered an original proposition. This clause of our constitution received consideration at a very early day, and its scope and purpose was declared in the early decisions of this court, ranging from the third to the thirty-fifth Wisconsin Reports. It was considered in two cases in the third Wisconsin (*Madison, W. & M. P. Co. v. Reynolds,* 287; *Pratt v. Brown,* 603), but six years after the adoption of the constitution. It was also under consideration in *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *Kenosha, R. & R. I. R. Co. v. Marsh,* 17 Wis. 13; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *State v. Milwaukee G. L. Co.* 29 Wis. 454; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257. It is manifest from a perusal of those cases that there was no confusion in the minds of the then members of this court concerning the object, scope, or purpose of the provision. While what was said in some of those cases with reference to this reserved power was possibly *obiter,* we regard the expressions of opinion as authoritative nevertheless, whether *obiter* or material to the question involved. There is a uniformity of opinion running through all of those cases with reference to the scope and purpose of this constitutional provision characterized by an assurance that suggests a thorough understanding of the subject treated, and in none

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of these cases do we find an intimation that the reserved power is confined to the primary franchise of a corporation.

In *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287, it was held that a power of alteration reserved in an act amending the act incorporating the company, which amendment was accepted by it, reserved to the legislature the power to alter the rate of toll provided in the charter act.

In *Pratt v. Brown,* 3 Wis. 603, it was held that the legislature under the reserved power, in repealing the mill-dam law, had power to divest a corporation of its franchise of easement to flow lands acquired thereunder.

In *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295, was involved an amendment to the special act incorporating the insurance company, by which the trustees were authorized to change the company from a mutual to a stock company, thus changing the contract relation between the corporation and its members without their consent. The power of the legislature to pass the amending act was rested upon the reserved power of the constitution.

Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13, involved an act of the legislature amending a special railroad incorporation act, changing the lines of road. It was held that this change released the subscribers to the company's stock. In this connection it was considered whether the constitutional reserved power might operate to give the amending act the effect to bind the stock subscribers. In that case it was said that the object of the reserved clause was to avoid the effect of the decisions of the federal supreme court holding corporate charters to be contracts protected under the federal constitution, "so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary," and adding: "Undoubtedly the legislature might, under this power, impose new duties and new restraints upon corporations in the prosecution of the enterprises already undertaken. And

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provisions of this nature would be binding whether assented to or not."

In *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167, the reserved power is discussed *arguendo,* and it is said that the power of the state to regulate the tolls of railroad companies cannot be lost, because the power is reserved to the legislature under sec. 1, art. XI, Const., to alter or repeal all charters or acts of incorporation, and to limit tolls and fares to a reasonable sum.

In *State v. Milwaukee G. L. Co.* 29 Wis. 454, where a charter granting an exclusive franchise to supply gas to the city of Milwaukee was under consideration, the court declared that "the legislature retains control over such charters in this state, and has the power to take away any exclusive privilege or franchise which it may have improvidently granted."

In *Chapin v. Crusen,* 31 Wis. 209, 215, the court, in holding that the legislature might repeal a dam franchise granted to natural persons, referred to sec. 1, art. XI, Const., and said, *arguendo:* "Had this franchise been conferred on such a corporation, there can be no doubt that the legislature might take it away."

In *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257, it was held that an act of the legislature subjecting to taxation certain lands of a railroad company which had been exempted from taxation by a prior act separate and apart from the act of incorporation, was a valid exercise of the reserved power. In that case Mr. Justice COLE gives elaborate consideration to the scope and purpose of the reserved clause of the constitution, saying among other things:

"The object and historical origin of the provision in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over

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corporate franchises, rights and privileges which it might grant,—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated *Dartmouth College Case.* With the grant of exemption from taxation was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage. It was a qualification of the grant, and the subsequent exercise of the reserved power cannot be regarded as an act impairing the obligation of contracts."

In *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 562 *et seq.*, the question of the reserved power also receives elaborate consideration by Mr. Chief Justice RYAN. The previous decisions of this court are reviewed, the *Dartmouth College Case* is considered and criticised, its baneful consequences to the public interest are pointed out, that the purpose of the reserved power was to save the state from the pernicious effects of that decision is declared, and it was distinctly held that ch. 273, Laws 1874, fixing the maximum rates to be charged by railroad companies, was a valid exercise of legislative power notwithstanding the charters of such railroad companies granted them unlimited right to impose rates and charges in their discretion. In summarizing the law upon that question (p. 574) it is said:

"And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule in the *Dartmouth College Case,* as applied to corporations, never had place in this state, never was the law here. The state emancipated itself from the thraldom of that decision in the act of becoming a state; and corporations since created here have never been above the law of the land."

The early judges who thus discussed, considered, and applied this clause of our constitution were of a time when the decision of the *Dartmouth College Case* was still a subject of criticism and resentment. The reserved power was an invention of their generation, and they understood well its purposes. Prompted by the suggestion of Mr. Jus-

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tice STORY in his concurring opinion in that case, that if the states desired to retain the power to alter or amend corporate charters they should reserve it in the grant, many states provided by general statutes that all corporate grants should be subject to the power to alter or amend. Other states made similar provision in the respective charters as granted, while still others, subsequently coming into the Union, including our own, reserved such power in the constitution. While there was a lack of similarity in the language used, the purpose intended to be accomplished was uniform. The purpose of all the states was to preserve a well-recognized incident of sovereignty, the right to regulate and control corporations of their own creation, to the end that the recipients of corporate grants—which may seem wise today and prove improvident tomorrow—should not be permitted to convert the bounty of the state into an instrument for the oppression of its people. This result could not be accomplished by a reservation of power to alter or amend the primary franchise of the corporation. It is the use made of the secondary franchise, grants in the nature of property which may be turned to the public detriment, that must be kept under the control and regulation of the state if the generosity of the state is not to be turned to the exploitation of its people. And so far as our investigations have gone, reserved clauses of this character have been given the scope and effect necessary for the accomplishment of this purpose. "The reservation affects the entire relation between the state and corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." *Tomlinson v. Jessup*, 15 Wall. 454.

The supreme court of the United States has been liberal in its construction of similar provisions reserving to the states power to alter or amend corporate charters, as a consideration of the following cases decided by that court

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will indicate: *Tomlinson v. Jessup,* 15 Wall. 454, 456; *Miller v. State,* 15 Wall. 478; *Holyoke Co. v. Lyman,* 15 Wall. 500; *Shields v. Ohio,* 95 U. S. 319, 324; *Railroad Co. v. Maine,* 96 U. S. 499, 500; *Greenwood v. Freight Co.* 105 U. S. 13, 17; *Railroad Co. v. Georgia,* 98 U. S. 359, 361; *Close v. Glenwood Cemetery,* 107 U. S. 466, 2 Sup. Ct. 267; *Spring Valley W. W. Co. v. Schottler,* 110 U. S. 353, 4 Sup. Ct. 48; *Hamilton G. L. & C. Co. v. Hamilton,* 146 U. S. 258, 13 Sup. Ct. 90; *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 14 Sup. Ct. 437; *Pennsylvania College Cases,* 13 Wall. 190; *Sinking-Fund Cases,* 99 U. S. 700; *Stanislaus Co. v. San Joaquin & K. R. C. & I. Co.* 192 U. S. 201, 24 Sup. Ct. 241.

The disposition of the federal supreme court to construe all such reservations to give effect to the evident spirit and purpose thereof is indicated in *Railroad Co. v. Georgia,* 98 U. S. 359. An act of the legislature of Georgia incorporating a railroad company conferred upon it a limited exemption from taxation. A section of the general statutes of that state provided that "in all cases of private charters, hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter." It was held that a subsequent legislative act taxing the property of such corporation as other property in the state was taxed was not prohibited by that provision of the constitution of the United States which declares that no state shall pass a law impairing the obligation of contracts. The court said:

"No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the state to withdraw it, and subject to be changed, modified, or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter. . . . It is quite too narrow a definition of the word 'franchise,' used in this statute, to

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hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every and any right or privilege which is a part of the franchise."

It is apparent that a narrow or literal construction of the reservation provision found in this statute of the state of Georgia would have limited the reserved power to the franchise to be a corporation; but, without hesitation, the court pronounces that "too narrow a definition of the word 'franchise,'" and very readily construes it to apply to what we here term the secondary franchise of a corporation. In doing so the court simply gave effect to the general understanding concerning the purpose and scope of such reservations, and such is the spirit in which the reserved power of our own constitution was construed by early decisions of this court.

While there has been no general discussion of the nature and scope of the reserved power in the decisions of this court subsequent to *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, that feature thereof seemingly having been considered as settled by the elaborate consideration there given it, it nevertheless has been frequently applied by this court since that time to justify legislation modifying corporate grants in the nature of secondary franchises, as will be seen by the following cases:

In *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326, it was held that the legislature, under the constitutional reserved power, could and did alter the terms of a street railway franchise previously granted fixing the rates of license fee per car which it required to be paid to the city. In that case the original license fee was fixed by a city ordinance enacted under the terms of a general law. The franchise privilege in no way related to the franchise

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to be a corporation and clearly not essential to corporate existence.

In *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818, although the statement is *obiter* in the case, the court declared that the legislature, under the reserved power, may alter and regulate the rates of a public-service company as prescribed in the municipal franchise-ordinance.

In *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118, in an opinion by Mr. Justice MARSHALL, it was held that a Wisconsin railroad corporation is not entitled to damages for the crossing of its tracks by a highway, nor to compensation for the cost thereby imposed upon it of constructing crossing-gates, cattle-guards, planking between the rails, or other structures required to make a safe crossing, because the burden of these structures could be imposed upon the company under the police power and under the power reserved in sec. 1, art. XI, of the state constitution to amend corporate charters. In the course of the opinion it is said:

"It may be laid down as established beyond reasonable controversy that railroad corporations are subject to all such reasonable regulations as may from time to time be prescribed by legislative authority, pursuant to the police power incident to the sovereignty of the state, and are also subject to the power reserved under the constitution, to alter or amend corporate charters."

In *State v. Railway Cos.* 128 Wis. 449, at p. 505 (108 N. W. 594), the reserved power of the constitution was invoked to sustain the general laws fixing the license fees to be paid by railroad companies to the state. The successive statutes involved are treated as a part of the corporate charters of the railroad companies as inhering therein, but the rights affected were clearly not rights essential to corporate existence, nor a part of the franchise to be a corporation.

In *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925, it was said, in an opinion by Mr. Justice

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BARNES, that the right conferred on a street railway company to use the public streets under sec. 1862 or sec. 1863, Stats., becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it, and that the reserved power of amendment or repeal contained in sec. 1, art. XI, Const., would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself.

The only suggestion coming from any member of this court, from the beginning of state government down to the present time, that the reserved power does not extend to the secondary franchises of a corporation, is found in an independent opinion, in the nature of an *erratum,* filed by Mr. Justice MARSHALL in the case of *Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131. In that opinion he speaks of the difference between the franchise of a corporation and a franchise granting corporate existence, and intimates that the reserved power of the constitution applies only to the primary franchise, which he calls a corporate franchise. In his dissenting opinion, concurred in by Mr. Justice VINJE, filed in the case of *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491, the same learned Justice, for whose ability we entertain the highest regard, gives additional expression to the view that it is only the franchise granting corporate existence that is within the reserved power. In those opinions it was assumed by the learned Justice who wrote them that the distinction between the primary and secondary franchise of a corporation had been overlooked in some of the prior decisions of this court, and suggested that such distinction was pointed out in *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, 86 N. W. 592; *In re Southern Wis. P. Co.* 140 Wis. 245,

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122 N. W. 801. It is true that the distinction between the two classes of franchises was referred to in those cases, but not for the purpose of applying the reserved power we are now considering. Questions did arise in those cases which made the distinction between the two classes of franchises germane to the discussion, but in none of them was the reserved power involved or mentioned.

In *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697, the action was brought by the attorney general to forfeit the waterworks franchise granted by the city of Portage to certain individuals and subsequently assigned by them to the defendant, a foreign corporation. The question was whether the privileges granted by the ordinance constituted a franchise emanating from sovereign authority within the meaning of that term as used in sec. 3466, Wis. Stats. Much is said in the opinion concerning the franchises to be, and other franchises of, a corporation, but not a word is said concerning the reserved power.

In *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, 86 N. W. 592, the question was whether plaintiff was entitled to a mechanic's lien on a certain power house, the answer to which was held to depend on whether the property was essential to the maintenance and operation of the defendant's system of street railways for which the defendant corporation was established. The reserved power was not involved and was not mentioned.

The question presented in the *Linden Land Company Case, supra,* was this: An ordinance of the city of Milwaukee granted to a street railway company the right to lay its tracks upon certain streets in the city of Milwaukee. The validity of this ordinance was challenged because it granted corporate powers or privileges which, as it was claimed, could be granted only by general law, by reason of sec. 31, art. IV, of the state constitution prohibiting the legislature from enacting any special or private laws for granting corporate powers or privileges except to cities, and sec. 32,

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art. IV, requiring the legislature to provide general laws for the transaction of any business prohibited by sec. 31. It was there held that sec. 31, art. IV, Const., applied only to the primary franchise of a corporation, and that all other franchises or privileges might be granted by special act.

Unless it be kept in mind that secs. 31 and 32 of art. IV of the constitution were added by amendment adopted in 1871, some confusion is likely to arise in reading the provision of sec. 31 in conjunction with sec. 1, art. XI, of the constitution. Sec. 31 was not in the constitution as originally adopted. Sec. 1, art. XI, was the only provision therein relating to the formation of corporations without banking powers. It provided that "corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The query naturally arises, What was the effect of the adoption of sec. 31 of art. IV upon the power reserved in sec. 1 of Art. XI? That question arose in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, decided in 1874, but three years after the adoption of the amendment. The identical question there presented was whether a charter granted by special act could, after the adoption of the amendment, be amended by special act. The court dwelt upon the purpose of the amendment. It was held that the purpose was to make mandatory the directory provision contained in sec. 1, art. XI, that corporations should be formed under general laws. With reference to the effect of the amendment upon the reserved power the court said:

"We shall not stop to dwell here on the importance of the reserved power. We may do that later, in a more appro-

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priate connection. We shall only assume here that it is a power of great significance and gravity; of such moment, that it is impossible to believe that the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it, by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power."

And there the phrase in the amendment "to grant corporate powers and privileges" was held to mean "*in principio donationis,* and equivalent to the phrase 'to grant corporate charters.' This is implied not only by the word 'grant,' but also by the word 'corporate.' A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation." When these excerpts from *Att'y Gen. v. Railroad Cos.* are read in connection with the further extended discussion of the reserved power therein contained, to which we have heretofore adverted, we think there can be no doubt that it was there held that the amendment of 1871 had no effect whatever upon the reserved power, and that its original force and vigor remained unimpaired. The effect of the amendment as well as its purpose was to require the formation of corporations under general laws. Other franchises, such as the right to build dams, construct reservoirs, use public streets, etc., might thereafter as before be bestowed upon them by special act. This was the holding in the *Linden Land Company Case, supra* (107 Wis. 493, 83 N. W. 851), and the reserved power of the constitution was not there mentioned or considered.

In re Southern Wis. P. Co. 140 Wis. 245, 122 N. W. 801, involved a question similar to that considered in the *Linden Land Company Case,* and the ruling of the latter case was followed. The reserved power was not in question nor was it discussed.

The case of *La Crosse v. La Crosse G. & E. Co.* 145 Wis.

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408, 130 N. W. 530, is also cited by Mr. Justice MARSHALL in his dissenting opinion in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491, and much reliance is placed thereon by the attorney for the respondent here. If there is anything in that case which casts doubt upon the scope of the reserved power as we construe it, it is ambiguous indeed. (The corrective opinion filed by Mr. Justice MARSHALL in the *Calumet Service Company Case, supra,* was intended to correct certain mis-impressions which he thought might be given by the language used in that case.) It was said therein, speaking of the franchise of the Gas & Electric Company granted to it by the city of La Crosse:

"The entirety was a state grant and so under legislative control like any other corporate state franchise."

And further:

"Whether mere contractual features, as between the state or any instrumentality used by it in conferring special privilege, and its grantee, inhering in the privilege itself, the franchise not being corporate, are within the reserved power to alter, amend, or repeal under sec. 1, art. XI, of the constitution, need not be discussed for the reason stated. What the plaintiff did, if anything of a contractual nature, since it appertained to the franchise itself, the state did. What the two real parties to the transaction mutually did, obviously, they could mutually undo."

And here is the language upon which counsel for respondent so strongly relies:

"Though we thus leave a subject treated in the briefs of counsel, with passing notice, it is not to be taken as doubting the state of the law on the question. One needs, in respect to it, to distinguish between corporate franchises; in the sense of the right to corporate existence, and corporate franchises, as the term is often, not very accurately used; in the sense of, a privilege owned by a corporation in its proprietary capacity; a thing granted which when accepted is property,—may be acquired or parted with as any other property might, barring special legislative restrictions.

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(Citing.) The distinction has not always been appreciated (citing); and remarks with reference thereto in cases cited above and comparison therewith of *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818, and the language of and precise subject dealt with in sec. 1, art. XI, of the constitution."

Whatever was in the mind of the learned Justice who wrote that opinion with reference to the reserved power of the constitution, we would not be justified in seizing upon these cursory and passing remarks as an excuse for overturning or modifying the scope and extent of the reserved power as settled by the long and uniform course of the prior decisions of this court heretofore cited in this opinion.

As stated in *Att'y Gen. v. Railroad Cos., supra,* we regard this power as one of great significance and gravity. We believe that when it was included in the constitution it was placed there for the purpose of reserving to the people of this state full power and control over corporations of its creation; that the purpose to be accomplished thereby was to reserve to the state those sovereign rights of which the states had been shorn by the decision in the *Dartmouth College Case,* and that any construction which limits the scope of this power to a narrower field amounts to a judicial deprivation of sovereign rights which the people believed they had preserved to themselves by the terms of sec. 1, art. XI, of the constitution.

This construction implies no denial of vested or property rights in valuable privileges granted to a corporation, essentially connected with its franchise and necessary to its business, which conduced to an acceptance of its charter and an organization under it. Such privileges are property. But in this state they are not unincumbered property. They are incumbered with the right of the state to alter or repeal them. The title of the grantee is necessarily a qualified title, because that is the only title the state can give. The constitutional provision under consideration deprives the legislature

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of the power of granting an unqualified right. The grantee takes them subject to this power of the state to alter or repeal. The corporation which invests its money in reliance upon such privileges does so in the faith that the power will not be unjustly or unreasonably exercised. And here it may be said that the power is not one to be used for the purposes of spoliation or oppression. It is a power which the state is permitted to invoke only for the promotion and the protection of public interests. That is the purpose for which it was reserved. It is not to be used arbitrarily or capriciously or for the purpose of punishment or retaliation. That has been decided by this court. *State ex rel. Northern Pac. R. Co. v. Railroad Comm.* 140 Wis. 145, 121 N. W. 919; *Water Power Cases,* 148 Wis. 124, 134 N. W. 330. It is an instrument of justice, not a weapon of discipline.

The public utility law was enacted as a remedy for a well-recognized public evil. The relations existing between the respective municipalities and their public utilities were most unsatisfactory. The impotency of the municipalities to deal with them so as to secure adequate and satisfactory service for reasonable charges was abundantly demonstrated. The officers of the municipality lacked the training in the technique of the public utility business which was essential either to protect the interests of the citizens or deal justly with the public utility company. Whether the relations between the municipality and the utility company were that of open war or supine acquiescence on the part of the city to the demands of the company, mattered little to the consumer. Unreasonable demands made by the city as a result of a lack of information concerning the public utility business were as fruitless of just results as meek submission to the ultimatums of the utility. The situation resulted neither in justice to the consumer nor stable business conditions to the utility.

So it was determined to take from the municipalities, which were not equipped to fix standards of service which

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might reasonably be demanded under the circumstances and determine reasonable rates therefor, the regulation and control of public utilities and vest that power with the railroad commission, which body, through its staff of experts, could acquire the information necessary to fix and enforce appropriate standards of service and just and reasonable rates which should adequately compensate the utility for the service rendered. The legislation has been welcomed by the public and the public utility companies alike. It has never been suggested that the purpose of the legislation was other than for the promotion of the public interests. That its effect was not to oppress the public-service corporations is abundantly shown by the fact that during the four years (from 1907 to 1911) in which the law was elective, many, if not the great majority, of those corporations voluntarily surrendered their existing franchises and submitted to the provisions of the law. It is believed that fourteen years of experience has vindicated the law as a measure of great public benefit, although recently, when abnormal industrial and commercial conditions have given rise to a general increase in rates of service, mutterings against the law, or its administration, may be heard. But it should not be forgotten that successful regulation must be fearless and fair and accommodated to the exigencies of changing conditions. Whenever the administrative agency appointed to arbitrate between the public and the utility is influenced by public sentiment rather than considerations of justice, the purpose of the law will fail, not because of its infirmities but because of its weak and servile administration. Critics should appreciate that private capital devoted to public service is entitled to a fair return, and that it requires more courage and character to render just than popular decisions.

Conceding that the public interest required it, it was competent for the legislature to repeal the franchises of all public utility corporations. *Greenwood v. Freight Co.* 105

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U. S. 13. This, however, it did not do. It simply substituted the powers and privileges of the public utility law for those of their existing franchises. It did not interfere with their right to occupy public streets or to continue in their respective businesses. The tenure of their respective franchises was made indeterminate instead of fixed and limited. Their regulation and control was vested with the railroad commission instead of the various municipalities. Truly this was a reasonable exercise of the reserved power, and was the initial step necessary to work the transition and carry out the legislative scheme.

A new franchise was therefore granted to the defendant in lieu of its original franchise by the enactment of ch. 596, Laws 1911. Thereafter its franchise was that of the indeterminate permit, and it was subject to the provisions of the public utility law. This also was its franchise on October 1, 1917, when it is claimed its original franchise expired. The public utility law had superseded everything of a franchise nature embodied in the original ordinance granted to it by the village of Superior and the subsequent and succeeding amendments thereto.

We now come to the very crux of this controversy. What is the effect of that law upon the provision found in the original franchise-ordinance providing that "at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks for another term of thirty years, upon the same terms and conditions as may exist *between the said village or city and the said Superior Water Works Company* at the expiration of the first thirty years, . . . then and in such case, the village shall purchase from said Superior Water Works Company, . . . said system of waterworks, and the property connected therewith, at a fair valuation, as provided in sec. 13"?

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It is the contention of the respondent *Water Company* that this provision of the ordinance is a contract entered into by the city in its proprietary capacity and that it is not inherent in, not connected with, and forms no part of, the franchise emanating from the state to the *Water Company* for the use of the streets of that city. The city contends that the provision is an inherent and constituent part of the franchise and is subject to be altered or repealed by the legislature. We find it unnecessary to determine which of these contentions is right; because, even though it be considered as a contract, we think it gives rise to no obligation on the part of the city to purchase the plant according to its terms. The manifest purpose of the provision was to assure the *Water Company* one of two things: either a renewal of its franchise for another period of thirty years or a sale of its property in case such franchise be not renewed. The franchise called for was one having "the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company at the expiration of the first thirty years." The franchise which it had at that date was the indeterminate permit. That was either its franchise or it had none. That was a continuing franchise. It was indeterminate as to time. It was not limited to thirty years or any other period. Consequently there was no occasion for the city to "grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks." It already had that right. There was therefore no breach of this part of the alleged contract on the part of the city. Until there was a breach of this provision of the contract, no obligation on the part of the city to purchase according to the terms of the contract arose. It seems plain that the position of the *Water Company* is not helped by construing this provision of the ordinance as a contract made by the city in its proprietary capacity. The conditions precedent to an obligation on the part of the city to buy under the

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terms of the contract have not come to pass, and the city has in no manner become obligated to carry out the feature of the contract which is sought to be enforced in this action.

Furthermore, the very law which substituted the indeterminate permit for the original franchise of the *Water Company* authorized the city of *Superior* to acquire the property thereof by eminent domain, and in thus proceeding to acquire it the city is exercising the sovereignty of the state, which was not and could not be bartered away by a municipal ordinance, or in any other manner. It is a familiar rule that all property is held subject to the right of the state to acquire it for public purposes whenever it may see fit to do so. The power of eminent domain is a sovereign power, whether exercised by the state or by an agency to whom it may be delegated. The property of the *Water Company* was at all times subject to this power. The state could take it in pursuance of that power at any time, and likewise it could authorize the city so to take it, and the exercise of the power was in no manner frustrated by the provisions found in the franchise-ordinance or in any of its amendments. The proceedings sought to be enjoined are in effect proceedings by the state to appropriate the property for just compensation, and its right and power so to do has not and cannot be suspended.

The law under which the city is proceeding to acquire the plant assures the *Water Company* adequate compensation for its property. We must assume that that is all that the *Water Company* will secure for its property if valued according to the provisions of the so-called contract. It is not alleged in the complaint that the method of valuation provided for by the public utility law will not afford the *Water Company* just compensation for its property, nor is it alleged that the valuation provided for in the ordinance will afford it more than just compensation. It is not alleged that it will be in any manner damaged if its property be valued in the way provided by the public utility law rather

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than in accordance with the terms of the alleged contract. If the method of valuation provided for in the ordinance is productive of unconscionable results and will result in an excessive valuation, then it should be considered whether a court of equity should, in the exercise of its discretion, invoke its power to decree a specific performance of the contract. However, we cannot assume such to be the case. We assume that either method will fix a just valuation upon the property, and that this controversy simply involves the question of which method shall be adopted in arriving at a just valuation of the property which the city seeks to take.

Our conclusion, therefore, is that the complaint states no cause of action and the demurrer thereto should have been sustained.

We may say that we have not been hindered in arriving at our conclusion by that line of cases in the federal supreme court such as *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. 756; *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118, and other cases cited in respondent's brief. In those cases similar ordinances were held to be contracts as between the municipality and the public utility. This is in harmony with our own decisions. *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818. In each of the cases cited the contest was between the municipality and the public utility, and the right of the state to alter or amend the corporate charters was not involved. In the leading case of *Detroit v. Detroit Citizens' R. Co., supra,* this question was specifically laid out of the case at page 397, where it is said: "The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case." Nor was it involved in *Detroit United Ry. v. Michigan,* 242 U. S. 238, 37 Sup. Ct. 87. In that case it appeared that the legislature

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passed an act extending the city limits of the city of Detroit, and the question was whether the street railways operating in the annexed territory could charge rates of fare provided by franchise granted to them by the town government, or whether, after the annexation, the city council of the city of Detroit had power to change the rates of fare prescribed in the original franchise. The court held that the rights of the railway company were fixed by the original franchise-ordinance granted by the town government, and that its rights so fixed could not be impaired by the Michigan act enlarging the limits of the city of Detroit. There was no purpose on the part of the Michigan legislature to alter or amend the charter or franchise of the street railway company. Neither was that power invoked to justify its action. Its effect on the franchise of the street car company was incidental merely, and the question involved was whether, after the annexation, the street car company was subject to the regulation and control of the common council of the city of Detroit.

In concluding this opinion it is proper to say that had a different conclusion been reached upon the questions discussed it would have been necessary to consider whether the alleged contract could have been enforced against the city, in view of the fact that the state had withdrawn from the city the power to grant the franchise. It is a general rule of law that performance of contracts is excused when rendered impossible by act of law. 18 Mich. Law Review, 602, and cases there cited. The legislature had rendered it impossible for the city to renew the franchise for a term of thirty years or for any other term. Having deprived it of the power to grant the franchise, the question of whether its obligation to buy the plant, which obligation is dependent upon its failure to grant the franchise, could be enforced, would require serious consideration. This case is very analogous to *Macon & B. R. Co. v. Gibson,* 85

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Ga. 1, 11 S. E. 442, where the performance of a contract was excused upon quite similar considerations.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer to the complaint.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Charles R. Fridley* of Superior and *H. L. Butler* of Madison, counsel for the *Water Company.*

In opposition thereto there was a brief by *T. L. McIntosh,* attorney, and *Louis Hanitch,* of counsel, both of Superior.

On March 11, 1921, an order was entered granting a rehearing upon the question set forth in the opinion filed May 31, 1921.

For the appellants there was a brief by *T. L. McIntosh,* city attorney, and *Hanitch, Hartley & McPherson* of Superior, attorneys, and oral argument by *Mr. Louis Hanitch* and *Mr. McIntosh.*

Charles R. Fridley of Superior and *H. L. Butler* of Madison, counsel for the respondent *Water Company.*

The following opinion was filed May 31, 1921:

OWEN, J. Upon motion for rehearing, attention was called to the fact that the opinion of the court did not deal with the question whether the city could, by proceedings in the nature of condemnation provided for by the public utility law, acquire that part of the *Water Company's* property located in the state of Minnesota, which issue was tendered by the pleadings though not dwelt upon in the briefs or the oral argument. Apprehension was expressed on the part of the respondent *Water Company* that the mandate of this court directing that the demurrer to the complaint be sustained amounted to *res adjudicata* upon this question, even though not dealt with in the opinion. The question thus raised is an important one, which would no doubt eventually call for the decision of this court; and

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while it would ordinarily reach this court on appeal from the order of the railroad commission, the court, believing that the interests of the parties would best be promoted by dealing with the question at the present time, to the end that further proceedings on the part of the city to acquire the waterworks plant should take a course in harmony with the view of this court concerning the power of the city to condemn that portion of the plant, an order was entered granting a rehearing upon the following question:

"Upon any proceedings heretofore taken, or upon any proceedings authorized by law, can the city acquire, under the provisions of the public utility law, or under condemnation proceedings, or in any proceedings in the nature thereof, or in any manner, title to that portion of the property of the respondent *Water Company* located in the state of Minnesota?"

In response to that question the *Water Company* contends that the proceedings under which the city is attempting to secure title to the property of the *Water Company* are essentially proceedings in condemnation; that the city is not confining its efforts in such behalf to the taking of so much of the plant of the *Water Company* as is physically located in the state of Wisconsin, but that they extend to and include as well that portion of the plant physically located in the state of Minnesota; that the jurisdiction of this state to condemn property and thereby work a transition of title from the *Water Company* to the city does not extend to property located in the state of Minnesota, and that the city should be enjoined from any further efforts to secure title to that part of the plant having its physical location in the state of Minnesota, because of such lack of jurisdiction or power on the part of this state.

In the first place, it may as well be conceded that the proceedings under which the city is attempting to acquire title to the waterworks plant are condemnation proceedings. Although the public utility law (sec. 1797*m*—78, Stats.)

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provides that any public utility voluntarily accepting an indeterminate permit shall be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, and by sub. 4, sec. 1797*m*—79, Stats., it is provided that any municipality shall have the power, subject to the provisions of the public utility law, to acquire by purchase, as provided in the public utility law, the property of any public utility actually used and useful for the convenience of the public operating under any indeterminate permit, it was held in *Connell v. Kaukauna,* 164 Wis. 471, 159 N. W. 927, 160 N. W. 1035, that proceedings on the part of a municipality to acquire the property of a waterworks company under the provisions of the law just referred to were in the nature of condemnation proceedings. There is much greater reason for saying, and in fact there seems to be little room to doubt, that proceedings on the part of a municipality to acquire the property of a public utility company which has not voluntarily subjected itself to the provisions of the public utility act are in the nature of condemnation proceedings. In view of the ruling made in the *Kaukauna Case* that such proceedings are in the nature of condemnation proceedings even where the public utility has voluntarily accepted an indeterminate permit, it would seem unnecessary to devote either time or space to demonstrate that the proceedings here in question are in fact in the nature of condemnation proceedings. Neither does there seem to be any room to doubt that this state is without any jurisdiction or authority to condemn property beyond its borders and over which it exercises no jurisdiction whatever.

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The question with which we are confronted is whether that part of the water plant which reaches across the state line into the waters of Lake Superior, from which the supply of water is pumped for the use of the city, is in fact Wisconsin property. We freely concede at the outset that that question must be answered in the affirmative in order to enable the city to proceed to continue the proceedings now instituted to a successful termination, and that unless the question may be so answered the demurrer to the complaint should be overruled.

And right here perhaps a word descriptive of the plant is appropriate, if not necessary, to a thorough understanding of what follows. The city of *Superior* is located at the mouth of the St. Louis river, at which place the river widens out and has more the appearance and characteristics of a bay than a river. This bay is commonly known as the Bay of Superior and is about a mile in width. The opposite shore of this bay is formed by a narrow strip of land called Minnesota Point, and is a part of the state of Minnesota. In order to secure a supply of pure water from Lake Superior, the *Water Company,* pursuant to an agreement referred to in the main opinion, extended a main across the Bay of Superior and across Minnesota Point, which is perhaps from forty to sixty rods in width, and on out into the lake a sufficient distance to enable it to secure pure and wholesome water. It is that portion of this intake pipe, so called, which extends beyond the boundary line between Wisconsin and Minnesota and across Minnesota Point into Lake Superior that is referred to as that portion of the plant lying in the state of Minnesota.

From this it will be seen that while this intake pipe is a very essential, it is, comparatively speaking, a small, proportion of the entire property of the *Water Company.* It is, however, an integral part of the plant and inseparable therefrom; that is to say, its existence was deemed essential

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by both the *Water Company* and the city to enable the former to fulfil the obligation imposed upon it by its franchise of furnishing pure and wholesome water to the inhabitants of the city; that it always has been considered, and in fact is, an essential and integral part of the plant, is beyond doubt. A severance of this intake pipe from the plant at the boundary line of the state would make junk of the pipe lying beyond, and necessitate some other expensive arrangement on the part of the company to procure a supply of wholesome water for the city.

The *Water Company* is a corporation organized under the laws of the state of Wisconsin. It has a franchise to operate a waterworks plant in the city of *Superior* derived from the state of Wisconsin. Every part and parcel of the property sought to be acquired by the city in the proceedings complained of is property devoted by the *Water Company* to the fulfilment of the duties laid upon it by its franchise. It is settled in this state that the franchise of a public utility corporation and the property devoted by it to the performance of the duties imposed upon it by the franchise constitute an entirety, and the property, neither in its entirety nor in parcels, can be separated from the franchise, and that as the franchise is deemed the principal thing and is an incorporeal hereditament, the entire property assumes the character of personalty. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554, 51 N. W. 1004; *Chapman V. M. Co. v. Oconto W. Co.* 89 Wis. 264, 60 N. W. 1004; *Fond du Lac W. Co. v. Fond du Lac,* 82 Wis. 322, 52 N. W. 439; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 63 N. W. 746; *Washburn v. Washburn W. W. Co.* 120 Wis. 575, 98 N. W. 539; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557. In the latter case this principle was phrased in this way:

"This court has held that the franchise is the principal, the visible things the minor, part of an organized business

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machine, in a corporate organization, though the franchise is seen only through the physical part and its use; that the intangible part is personal property and draws to it, and so impresses the physical thing with its own character as to give to the whole the character of personalty."

It thus will be seen that the water plant is an entirety inseparable and indivisible. Its principal location is in this state. It is owned by a corporation chartered in this state. It is devoted to a public use in this state, and to enable the corporation to discharge the duties assumed by it when it accepted its franchise granted by this state. It is assessed for purposes of taxation as an entirety under the laws of this state. Its value as an entirety is taken as a basis for rate-making purposes under the law of this state. It is difficult to conceive of property more clearly and definitely subjected to the jurisdiction of this state. Although a portion of it may be physically located beyond the borders of this state, nevertheless, it being deemed personal property, it has a legal situs in this state; and this is as true of any real estate or interest therein that the company may own to enable it to lay its pipe across Minnesota Point as it is with reference to any other part of the plant.

This state, therefore, has ample jurisdiction to deal with the entire property as property within this state and to take the title from the *Water Company* pursuant to its power of eminent domain. Should there be any difficulty in vesting the city with title to real estate on Minnesota Point, a court of equity has ample power to compel a conveyance on the part of the *Water Company*, which it would not hestitate to exercise in order to effectuate legislation enabling municipalities to acquire title to the public utilities rendering public service to and within such municipalities. It is well settled in this country that a court of one state may decree the foreclosure of a mortgage on property lying partly within the state of its jurisdiction and partly in another

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state, and direct a deed to the purchasers. *Muller v. Dows,* 94 U. S. 444, 24 Lawy. Ed. 207. See, also, note on jurisdiction of equity over suits affecting real property in another state or country in 69 L. R. A. 673. While in such cases the decree is based on the principle that a court of equity having jurisdiction of the person may decree a conveyance by him of land in another state, and may enforce the decree by process, no reason is perceived why the same principle should not apply in a situation such as this. A court of equity of this state may acquire jurisdiction over the public utility. Should it be thought that some contractual relation between the state and the utility is necessary to justify the action, as of course is present in case of a mortgage foreclosure, that readily may be found in the franchise granted by the state to the public utility, which in this case was amended pursuant to the reserved power of the legislature. The franchise of the *Water Company,* which enables it to pursue its business of supplying water to the city of *Superior* and its inhabitants, is a contract between it and the state. As amended by the legislature pursuant to the reserved power, that contract provides that its property may be acquired in the manner here attempted, and, if necessary to carry out the legislative scheme, a court of equity should not hesitate to compel the utility to execute conveyances to property the title to which cannot be affected by the condemnation proceedings outlined in the public utility law.

This view makes it unnecessary to consider many other objections made to the proceedings in the brief of the appellant *Water Company.*

It is contended that the proceeding is barred by numerous provisions of the federal constitution, such as art. I, sec. 10, prohibiting any state from passing laws impairing the obligations of contract, and the Fourteenth amendment, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law, and that it

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constitutes an unlawful interference with interstate commerce. We feel that so far as these objections merit attention they are answered in what already has been said.

The question of the power of the city to acquire and own property beyond the state as well as city boundaries is considered in the briefs, though such power is not seriously doubted. In fact the *Water Company* not only concedes but successfully contends that the city has such power. We think there can be no doubt of it. The city is authorized not only by its charter but by the public utility law to acquire, own, and operate a waterworks plant. If the only available or practicable supply of pure and wholesome water for a boundary-line city lies across the state boundary, the power granted generally to municipalities of this state to own and operate waterworks plants would be denied to our boundary-line cities if they could not extend pipes and mains across the boundary line to such available water supply. That a city may acquire and own property, including real estate, beyond its borders to enable it to perform its municipal functions or powers expressly conferred upon it, was settled in this state by the case of *Schneider v. Menasha,* 118 Wis. 298, 95 N. W. 94, following the decided current of authority in this country, as will fully appear by the perusal of the opinion therein. The case of *Becker v. La Crosse,* 99 Wis. 414, 75 N. W. 84, involved an exercise on the part of the city of La Crosse of governmental functions in the state of Minnesota, the authority to do which was of course denied. The exercise of municipal functions on the part of a municipality beyond its boundaries is an entirely different matter from the owning of real estate in its proprietary capacity so far as it may be necessary or convenient for the discharge of municipal powers and functions. Neither the law nor public policy of this state interferes with the acquirement by the city of *Superior* of that portion of the waterworks plant reaching beyond the boundary line of this state.

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Should the laws of the state of Minnesota deprive a foreign municipality of the right to acquire or own property, either real or personal, in the state of Minnesota, a further question would be presented. However, there is nothing before us to indicate that the city of *Superior* may not acquire and own any portion of this plant physically located in the state of Minnesota under the laws of that state.

Upon this consideration of the further issue raised upon the motion for a rehearing we arrive at the conclusion that the demurrer to the complaint should have been sustained, and the mandate entered herein is correct.

ROSENBERRY, J., dissents on rehearing.

JONES, J., took no part.

AMERICAN WRECKING COMPANY, Appellant, vs. MCMANUS, Respondent, and VOGEL REAL ESTATE COMPANY, Impleaded Defendant.

MCMANUS, Appellant, vs. VOGEL REAL ESTATE COMPANY, Defendant.

January 13—February 8, 1921.
May 7—May 31, 1921.

Sheriffs: Writs of restitution: Compensation to persons aiding in execution: Personal liability of sheriff: Waiver of prepayment of charges: Deputy as agent of sheriff: Liability of landlord for expenses of sheriff: Fees of sheriff in executing writ: Notice of appeal: On whom served: Time within which other appeals may be taken: Waiver: Enlargement of time by supreme court.

On first appeal:

1. Since under sub. (24), (25), sec. 59.28, Stats. 1919, a sheriff is entitled to reimbursement for necessary expenses incurred in serving a writ or other process, he was liable for services

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rendered by a wrecking company employed by his deputy to remove heavy machinery in the execution of a writ of restitution, since the sheriff, in serving the writ and incurring the expense, was not acting as agent for the public but as a principal in the performance of an official duty.

2. A sheriff who undertakes the service of a writ without demanding his fees and charges in advance waives their prepayment.
3. A deputy sheriff acts as the general agent for the sheriff while in the discharge of official duties and has authority to bind the sheriff in incurring expenses in the service of a writ.

On second appeal:

4. Under sec. 3049*a*, Stats., providing that if one of several parties bound by the same judgment appeals therefrom he shall serve his notice of appeal on all parties bound with him by the judgment, one appealing from a judgment must serve his notice of appeal upon all who are bound by the judgment, and those so served shall within thirty days thereafter take and perfect their own appeals or be deemed to have waived their right; the purpose of the statute being to require all appeals from the same judgment to be taken speedily so that all may be heard at the same time and disposed of by a single mandate.
5. Under said sec. 3049*a*, providing further that the supreme court may, at any time after an appeal is taken, bring in additional parties, one bound with an appellant by the same judgment may be brought in and allowed to perfect his appeal after the lapse of thirty days, the section being in the nature of a default rather than a statutory bar, and the courts having broad powers to relieve defaults. The rule that the court cannot authorize an appeal after the expiration of the statutory period is inapplicable.
6. A defendant who brings in a third party who will be liable over to defendant in case he is held liable to plaintiff should, upon an appeal by the plaintiff from the judgment in the original action, appeal from that portion of the judgment dismissing his cross-complaint, orderly practice requiring that the controversy raised by the cross-complaint be brought up on appeal so that this court may terminate the entire controversy.
7. Where a writ of restitution was issued upon a judgment in favor of a landlord, commanding the sheriff to cause the tenant to be immediately removed from the premises, and the execution of the writ involved the removal of heavy machinery and other property that could be moved only by tackle and other suitable apparatus, and the sheriff employed a

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wrecking company which did the work at considerable expense, the sheriff could recover the amount of his disbursements from the landlord, who, though he knew the character of the property and that assistance would be necessary to execute the writ, did not inform the sheriff that the ordinary execution of the writ was not desired.

8. Since sec. 59.28, Stats., provides that "Every sheriff shall be entitled to receive the following fees for his services, except for services in actions or proceedings before justices of the peace, for which fees are specially provided by law," a sheriff in serving writs issued out of justices' courts is confined to the fees prescribed for constables; but where such fees are not provided he is entitled to charge the fees prescribed in sec. 59.28, including reimbursement for all necessary expenses incurred in the execution of the writ of restitution, as provided by sub. (24) and (25).

9. Under sec. 3779, Stats., providing that no disbursements to officers or others shall be allowed unless the items are particularly specified and proved and were necessary and reasonable in the opinion of the justice, a constable is entitled to the same charge for disbursements in executing the writ of restitution as the sheriff under sub. (24) and (25), sec. 59.28, there being no provision in the schedule of fees to reimburse constables.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed, with directions.*

On the 6th day of April, 1918, a writ of restitution was issued out of the civil court of Milwaukee county upon a judgment therein rendered in favor of the *Vogel Real Estate Company* and against the Builders' Mortar & Supply Company, commanding the sheriff of Milwaukee county, taking with him the force of the county if necessary, to cause the said Builders' Mortar & Supply Company to be immediately removed from the premises therein described, and that the plaintiff have peaceable restitution of the same.

The defendant *Patrick McManus* was sheriff of Milwaukee county and had under him forty deputies and numerous office employees, including a bookkeeper. In accordance with a custom established by the sheriff, writs

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and papers to be served were delivered to the bookkeeper, who assigned them to the respective deputies for service. The writ of restitution in question was delivered to the bookkeeper, who placed it in the hands of Deputy Sheriff Sloane for service. The deputy duly served the paper on the Builders' Mortar & Supply Company, and discovered that the execution of the writ involved the removal of heavy machinery, iron beams, and other personal property that could be moved only by tackle and proper apparatus and appliances for moving heavy personal property of that character. The plaintiff was employed by the deputy sheriff to remove this property, and was necessarily engaged in doing the work from the 16th day of April, 1918, to and including the 30th day of April, 1918. Its bill for said services amounted to $1,327.55. Thereafter, and on or about the 11th day of May, 1918, the said sheriff filed a petition in the unlawful detainer action in the civil court, setting forth that the execution of the writ involved the removal of heavy articles of personal property; that the *American Wrecking Company* was employed therefor; that the reasonable value of its services in such behalf was $1,327.55, and prayed that such sum be fixed and allowed by the court as a necessary, reasonable, and legal disbursement and fee of said sheriff in the execution of said writ. By order dated June 6, 1918, the civil court allowed and taxed the said sum as costs and ordered the writ of restitution to be amended by adding such sum thereto as taxable costs which the said sheriff should make out of the goods and chattels of said defendant.

This action was brought by the plaintiff in the civil court of Milwaukee county to recover said sum of $1,327.55. Upon motion of respondent the *Vogel Real Estate Company* was interpleaded. The defendant *McManus* filed an answer and cross-complaint in which he denied liability to the plaintiff, but insisted that if he be held liable he recover of

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and from the *Vogel Real Estate Company* the amount of any judgment recovered against him.

The civil court held that the sheriff was not liable to the plaintiff and entered judgment dismissing plaintiff's complaint as well as the cross-complaint against the *Vogel Real Estate Company*. The plaintiff appealed from that part of the judgment dismissing its complaint, and the defendant *McManus* appealed from that part of the judgment dismissing his cross-complaint against the *Vogel Real Estate Company*, to the circuit court for Milwaukee county, where the judgment of the civil court was affirmed. The plaintiff brought this appeal from that part of the judgment of the circuit court which affirmed the judgment of the civil court dismissing its complaint.

The cause was submitted for the appellant on the brief of *Curtis & Mock* of Milwaukee, and for the respondent on that of *Winfred C. Zabel, William L. Tibbs,* and *Daniel W. Sullivan,* all of Milwaukee.

A brief was also filed by *Lines, Spooner & Quarles* and *John W. McMillan,* all of Milwaukee, as *amici curiæ*.

The following opinion was filed February 8, 1921:

OWEN, J. In support of the judgment appealed from respondent first relies upon the principle of law that a public officer acting within the scope of his authority and within his official capacity is not personally liable on contracts executed in behalf of the government unless he expressly and unequivocally agrees to be bound, and cites to this proposition, among other authorities, the case of *McCurdy v. Rogers,* 21 Wis. 197, where the following language is used:

"The law raises a very strong presumption against any credit being given to a public agent acting within the scope of his authority, and requires a clear intention on his part to charge himself, to make him personally liable. This presumption of the law is equivalent to an implied agreement

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that he shall not be liable while acting within his authority. If he acts in a case where he has no authority, and fully discloses to the party with whom he is acting his want of authority, or the want of authority is known to such party, and he does not exact the individual undertaking of the agent, we see not why the same presumption should not then be raised against the liability of the agent, as when he was acting within the scope of his authority."

It is said that by virtue of this principle neither the sheriff nor the deputy would be liable under the contract of employment of plaintiff in the absence of an express agreement on their part to assume personal liability, and that from the mere fact of employment such liability does not arise by implication. We have no disposition to question the rule under consideration, but we do question its applicability to the situation under consideration. The rule is applicable to the relation of principal and agent and applies where the agent (the officer) attempts to bind his principal (the public) by contract upon a subject concerning which he has some semblance of authority to contract, but where, in entering into the contract, he exceeds the scope of his authority and fails to bind his principal, the public. Under such circumstances it is held that an intention on the part of either of the contracting parties to create a liability on the part of the agent, the officer, will not be implied.

Where a sheriff in the service of a writ finds it necessary to secure assistance to execute the commands of the writ, such as the seizure or removal of property, or its safekeeping after the same has been taken into his custody, he is not acting as agent for the public. There is no provision of law which gives him the least semblance of authority to bind the public in such respect. If such services are employed for his convenience, or to enable him to properly discharge his official duties so as to save him from official responsibility, it is his individual matter, and in entering into such agreements he is acting as principal and not as

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agent for the public. It is an official duty which he is called upon to render and for the discharge of which the statute makes provision for his compensation or reimbursement. In sec. 59.28, Stats., which prescribes the schedule of fees for the sheriff, we find these provisions:

"(24) For serving any writ or other process with the aid of the county, two dollars and fifty cents *and all necessary expenses* incurred thereby.

"(25) All such necessary expenses incurred in taking possession of any goods or chattels and preserving the same as shall be just and reasonable in the opinion of the court."

These provisions of the statute provide for the sheriff's reimbursement for expenses such as were incurred in the instant case, and the person for whom the writ was served is responsible to the sheriff therefor. No other person has any interest in such disbursements, and there can be no pretense that in entering into such agreements of employment as the one consummated between the deputy sheriff and the *Wrecking Company* either the sheriff or the deputy is acting on behalf of the public. The sheriff, under such circumstances, acts as principal and not as agent for the public, and he is liable upon an implied promise to compensate him who is employed to assist him in the discharge of his official duty. A like conclusion was reached by the Iowa court under a statute containing provisions similar to those above quoted. *Rowley v. Painter,* 69 Iowa, 432, 29 N. W. 401.

The fact that the sheriff is compensated by the county upon a salary basis rather than under a fee system does not affect our conclusions. His official responsibility and powers are the same. It should also be said that he has it within his power to protect himself against personal responsibility under such circumstances, as it is his privilège to demand his legal fees and charges in advance. *Carlisle v. Estate of Soule,* 44 Vt. 265; *Jones v. Gupton,* 65 N. C. 48; *Adams v.*

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Dinkgrave, 26 La. Ann. 626; *Atkinson v. Hulse,* 30 Ark. 760; *Alexander v. State,* 42 Ark. 41. Where, however, he undertakes the service of the writ without demanding his fees in advance he waives their prepayment. *Carlisle v. Estate of Soule, supra.*

It is further contended by the respondent that even though the sheriff be held personally responsible upon such agreements when made by himself, nevertheless a deputy sheriff has no power or general authority to bind the sheriff in such respect, and this has been held by a number of courts. *Dooley v. Root,* 13 Gray, 303; *Dow v. Rowe,* 58 N. H. 125; *Lucier v. Pierce,* 60 N. H. 13; *Kendrick v. Smith,* 31 Me. 162; *Miller v. Bruff,* 64 Pa. Super. Ct. 177; *Krum v. King,* 12 Cal. 412. The first case in which it was so held seems to be *Dooley v. Root, supra.* The entire report of that case covers less than a page, and the conclusion there reached rests upon the following observations:

"But there is nothing in the relation of a sheriff to his deputy which can make the sheriff answerable upon the contracts of his subordinate officer. It is no part of the official duty of a deputy sheriff to make contracts with other persons to assist him in the discharge of his official duties. If he makes such contracts he makes them for his own convenience and on his own responsibility."

It will thus be seen that in that case the fundamental relations existing between the sheriff and his deputy received but passing consideration.

In *Kendrick v. Smith,* 31 Me. 162, the subject received more extended consideration, but we are not impressed with the logic upon which the court rested its conclusion, the gist of which is revealed by the following sentence:

"The deputy obtains the aid, which has been referred to, that neither he nor his principal should be liable for any claim for misconduct or negligence, and it could not have been intended by the authors of the statute that the sheriff should be liable on the one hand for the omission of official

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duty in his servant, and for the means used by the latter to secure him for this liability on the other."

The statutes of that state contained a provision similar to our present sec. 59.22, making the sheriff responsible for the default or misconduct in office of his deputy. It is generally held that the liability created by this section and by similar statutory provisions relates only to the tortious acts of the deputy. The Maine court argued that because the statute created this liability for the tortious acts of the deputy it could not be thought that the legislature intended to make the sheriff liable upon the contracts of the deputy entered into by him for the purpose of protecting the sheriff from tortious liability. This does not seem sound. If the sheriff is liable for the tortious acts of his deputy, why should he not be liable for contracts made by the deputy to enable the deputy to properly perform his duties and thus save the sheriff from tortious liability? By universal authority the deputy sheriff in making service of process is acting in the place of the sheriff. When the sheriff intrusts him with the service of a writ he constitutes him his agent to serve the writ and to do all things necessary to properly discharge the official duty devolving upon the sheriff by reason of the undertaking, and save him from responsibility for nonfeasance or malfeasance in its execution.

In *Ramsey v. Strobach,* 52 Ala. 513, the court, speaking of this subject, said:

"By sec. 817 of the Revised Code a sheriff is required to 'have one deputy, and may have as many as he thinks proper.' A full deputy sheriff, as Boothe was, according to the evidence in this cause, must in this state be considered a general agent for his principal. As such he must be presumed, when he seizes goods upon an attachment or execution, to have authority to provide for the safe-keeping of them, by committing them to a bailee; and to engage such bailee, if the goods be live-stock, to give them food, water, and proper care. A citizen may undertake such service upon

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an engagement or at the request of a deputy sheriff, and will be entitled to compensation for the performance of it, upon the presumption that the deputy has authority from his principal to make such an arrangement for the custody and preservation of the property seized. Such a transaction comes within the scope of a sheriff's duty, and may be entered into by his deputy as his general agent."

Similar logic led to a like conclusion in *Foster v. Rhinehart,* 11 N. Y. Supp. 629.

In this conflict of authority, we prefer to be guided by what appeals to us as the greater force of reason rather than what may be called the weight of authority, and hold that a deputy sheriff acts as the general agent for his principal, the sheriff, while in the discharge of official duties, and that individuals called upon to render assistance necessary to the proper discharge thereof may contract with the deputy upon the assumption that he has full power and authority to represent his principal. It follows that in the instant case the sheriff was bound by the engagement of the deputy, and that judgment should have been rendered in favor of the plaintiff for the reasonable value of the services rendered.

The *Wrecking Company* fixed the value of its services at the sum of $1,327.55. That such was the reasonable value of the services does not seem to be disputed. At any rate, the sheriff so averred in his application to have that amount allowed as costs in the original action. As there is no dispute concerning the value of the services, the case should be remanded with instructions to enter judgment in favor of the plaintiff and against the defendant *McManus* for the sum of $1,327.55.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in favor of the plaintiff in the sum of $1,327.55.

On March 8, 1921, respondent *McManus* moved to have the *Vogel Real Estate Company* made a party to the action,

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or in case of a denial thereof that the mandate be modified so as to direct further proceedings in the trial court.

The motion was argued by *W. L. Tibbs* and *Daniel W. Sullivan* for the respondent, by *John W. McMillan* for the *Vogel Real Estate Company,* and by *H. K. Curtis* for the appellant.

The following opinion was filed March 28, 1921:

PER CURIAM. The defendant *McManus* now moves the court to have the impleaded defendant, the *Vogel Real Estate Company,* made a party to the appeal in this action so as to enable this court to make a determination of the rights and liabilities of all the parties to the action and direct that a judgment be entered accordingly. We are persuaded that the right of appeal by the defendant *McManus* from that part of the judgment determining that the defendant *Vogel Real Estate Company* is not liable to *McManus* has not been waived by his omission to perfect an appeal within thirty days after the date on which plaintiff appealed. The following clause of sec. 3049*a,* Stats., does not apply to him under the steps taken by plaintiff in appealing this case:

"In case one of a number of parties jointly or severally bound by the same judgment appeals therefrom, he shall serve his notice of appeal on all parties who are bound with him by the judgment, and said parties shall thereupon within thirty days after such service, unless the time be extended by the trial court for cause shown, take and perfect their own appeals or be deemed to have waived their right to appeal."

The notice of appeal by the plaintiff, *American Wrecking Company,* was served on *McManus* and the *Vogel Real Estate Company.* The terms of this clause of the statute apply where "one of a number of parties jointly or severally bound by the same judgment appeals therefrom." This clause of the statute was evidently intended to include only parties who are "jointly and severally bound" by the judg-

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ment appealed from who stand opposed to the party in whose favor the judgment has been awarded. If one of the parties "jointly or severally bound" thereby appeals and if the other parties who are "jointly and severally bound" with him are served with notice of appeal by one of them, then they must perfect their appeal as required by the statute or be deemed to have waived it. The object of this procedure is manifestly to do away with successive appeals from a judgment by different parties "jointly and severally bound" by it. Such successive appeals would permit of a practice which would lead to an abuse of this court's jurisdiction. This should be avoided. As above shown, the statute, however, does not apply to the defendants in this case because the judgment of the trial court was in their favor and the case is brought to this court for review by the party opposed to them, namely, the plaintiff, which under the terms of the statute was *the party bound by the judgment.* Upon this motion, therefore, we have this situation: The plaintiff, the party bound by the judgment of the trial court, appealed from that part of the judgment dismissing its complaint demanding recovery against the defendant *McManus.* This left the part of the judgment dismissing the counterclaim of *McManus* against the codefendant, the *Vogel Real Estate Company,* unappealed from. On plaintiff's appeal this court determined that plaintiff had a good cause of action against the defendant *McManus,* and reversed the part of the judgment appealed from. The defendant *McManus* now asks that the defendant *Vogel Real Estate Company* be made a party to the appeal to the end that a final determination of the rights and liabilities between it and the defendant *McManus* may be determined in the light of the fact that *McManus* is held liable to the plaintiff and that judgment may be awarded determining the rights and liabilities between the defendants. We think it an appropriate case to exert this court's extraordinary

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power of superintending control to regulate its jurisdiction in this case so as to promote a speedy and final determination of the rights and liabilities of and between the defendants to the action. *Gertz v. Milwaukee E. R. & L. Co.* 153 Wis. 475, 140 N. W. 312.

It is therefore ordered that the judgment heretofore entered in this action be vacated and the defendant *McManus* given twenty days to take an appeal in due form from that part of the judgment not heretofore appealed from by the plaintiff, and to have the same duly certified to this court; and that such appeal be placed on the calendar for hearing at the May 3, 1921, assignment of causes for argument. The defendant *Patrick McManus* to pay the *Vogel Real Estate Company* $25 costs of this motion.

The following opinion was filed May 31, 1921:

OWEN, J. As indicated in the statement of facts in this case, this action was brought in the civil court of Milwaukee county by the plaintiff against *McManus,* the sheriff. *McManus* impleaded the *Vogel Real Estate Company* and filed a cross-complaint against it, alleging liability on the part of that company in the event that he be held liable to the plaintiff in the original action. This, presumably, was done pursuant to the provisions of sec. 2610, Stats., which provides:

"A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order."

The plaintiff appealed from the judgment rendered against it by the civil court to the circuit court, and *McManus*

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also appealed from that part of the judgment denying him relief against the impleaded defendant *Vogel Real Estate Company*. The judgment was affirmed in the circuit court, and the plaintiff again appealed, but the defendant *McManus* failed to appeal from that part of the judgment in favor of the *Vogel Real Estate Company*. The mandate of this court reversed the judgment upon the appeal of the plaintiff and remanded the cause with directions to enter judgment in favor of the plaintiff and against *McManus*. The latter thereupon filed a motion asking that the *Vogel Real Estate Company* be made a party, so that a final determination might be made of all the issues actually litigated or determined in the action, or, if said motion be denied, that the mandate of this court be changed or amended so as to direct such further proceedings in the court below as will enable it to finally determine and dispose of all the issues actually litigated in the action, and to enable said *McManus* to have judgment against the *Vogel Real Estate Company* in the amount of the liability adjudged against him in this action. This was followed by a motion for rehearing made by *McManus* in addition to the motion that the mandate of this court be changed in the event that a rehearing be denied. In response to these motions this court entered the following order:

"It is hereby ordered that the judgment heretofore entered in this action be vacated, and the defendant *McManus* be given twenty days to take an appeal in due form from that part of the judgment not heretofore appealed from by the plaintiff, and to have the same duly certified to this court; that such appeal be placed on the calendar for hearing on the May 3, 1921, assignment of cases for argument. Defendant *Patrick McManus* to pay the *Vogel Real Estate Company* $25 costs of this motion."

Thereupon *McManus* appealed from that part of the judgment adjudging that his cross-complaint against the *Vogel Real Estate Company* be dismissed. When the case

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was reached for argument the *Vogel Real Estate Company* moved to dismiss the appeal on the following grounds: (1) That the defendant *Patrick McManus* waived his right to appeal and this court is without jurisdiction or authority to extend the time within which the defendant *McManus* may appeal from said judgment pursuant to Wisconsin Statutes, sec. 3049*a;* (2) because such appeal is not taken in conformity with the Wisconsin Statutes in such cases made and provided; and (3) because and for the reason that the findings and judgment of dismissal in the civil and in the circuit court are not appealable, as the cause of action embodied in the cross-complaint was prematurely brought.

The question with which we are immediately confronted, therefore, arises on the motion of the *Vogel Real Estate Company* to dismiss the appeal. It is insisted that *McManus* was required to take his appeal within thirty days after service of plaintiff's notice of appeal upon him, by virtue of the following provisions of sec. 3049*a,* Stats.:

"In case one of a number of parties jointly or severally bound by the same judgment appeals therefrom, he shall serve his notice of appeal on all parties who are bound with him by the judgment, and said parties shall thereupon within thirty days after such service, unless the time be extended by the trial court for cause shown, take and perfect their own appeals or be deemed to have waived their right to appeal."

Discussing this provision, it was said in the *per curiam* opinion accompanying the order permitting *McManus* to appeal that the phrase "one of a number of parties jointly or severally bound by the same judgment" was evidently intended to include only parties who are "jointly and severally bound by the judgment appealed from who stand opposed to the party in whose favor the judgment has been awarded." We think this is the natural import of the language of that section above quoted, but further consideration of the provisions of this statute, together with the pronouncements

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of this court which evidently led to its adoption, constrains us to believe that the construction placed upon that section in the *per curiam* opinion is too narrow and, as so construed, it does not accomplish the legislative purpose.

At the January term for the year 1913 this court had before it the case of *Gertz v. Milwaukee E. R. & L. Co.* 153 Wis. 475, 140 N. W. 312. In that case plaintiff brought action against the Chicago & Milwaukee Electric Railroad Company and the Milwaukee Electric Railway & Light Company to recover damages for personal injuries. Judgment was rendered in his favor against the Milwaukee Company, but in favor of the Chicago Company and against the plaintiff. Plaintiff appealed from the judgment in favor of the Chicago Company. Plaintiff's appeal was brought on for hearing, at which time it appeared that the Milwaukee Company intended to appeal from the judgment rendered against it in the same action. The plaintiff insisted that if the Milwaukee Company intended to challenge the judgment it should join in plaintiff's appeal or take such course as would enable the court to decide the whole matter and close the litigation by a single judgment. It was the contention of the Milwaukee Company that it was not concerned with plaintiff's appeal from the judgment rendered in favor of the Chicago Company, and that it could appeal at any time within the period fixed by statute for the taking of an appeal. Concerning this the court said:

"To allow the practice proposed would result in an abuse of the court's jurisdiction, which cannot be tolerated. It would render possible successive appeals from a judgment, vexatiously and unnecessarily delaying the final determination of litigation. The court possesses inherent authority to regulate the use of its jurisdiction so as to prevent such hindrances. To that end it will conclusively presume, in a case of this sort, that any party affected by the judgment or order who shall have had due notice of the proceedings and does not appropriately challenge such judgment or order, has elected to waive the right to do so and will so dispose of

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the appeal as to preclude any further application to this court in respect to such judgment other than by the ordinary motion for a rehearing. In this particular case the matter submitted will be held to give the Milwaukee Electric Railway & Light Company reasonable time to enable it to properly present its objections to the judgment—taking an appeal in due form, if necessary, and having the same duly certified to this court, in which case such appeal will be placed on the calendar for hearing and disposition with the appeal already submitted. Sixty days from the entry of this order is allowed for that purpose."

There can be no doubt that sec. 3049*a* is a legislative embodiment of the rule there announced, and that the section was enacted for the purpose of establishing a legislative rule which would prevent "successive appeals from a judgment, vexatiously and unnecessarily delaying the final determination of litigation." As construed in the *per curiam* opinion, the statute would not reach the situation before the court in *Gertz v. Milwaukee E. R. & L. Co., supra,* and we are now convinced that the statute was enacted for the purpose of reaching not only the situation there presented, but for the purpose of requiring all appeals from the same judgment to be taken speedily, to the end that all complaints against the judgment may be heard at one and the same time in this court, and disposed of by a single mandate. We therefore construe sec. 3049*a* as requiring any person appealing from a judgment to serve his notice of appeal upon all who are bound by the judgment, and those so served must perfect their appeal within thirty days or be deemed to have waived it. This is the only construction that can be placed upon the section that will accomplish the evident legislative purpose, or prevent the evil arising from successive appeals deplored in the *Gertz Case.*

But it does not follow that the appeal should be dismissed. It will be noticed that by the provisions of sec. 3049*a* those who do not perfect an appeal within the time therein

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provided shall be deemed "to have waived their right to appeal." The very next sentence of that section provides:

"The supreme court may by order at any time after an appeal is taken bring in additional parties upon their own application or upon application of one of the original parties to the appeal, and in such case the party or parties so brought in shall be given an opportunity to be heard before final judgment is pronounced in said court."

This is appropriate language to reserve to the court its jurisdictional power asserted in the *Gertz Case*. The order entered in the *Gertz Case* provided, in effect, that although the Milwaukee Company had one year in which to perfect its appeal, yet, unless it exercised that right within sixty days from the entry of the order, it would be deemed to have waived the same, under the circumstances of that case. While sec. 3039 grants to an aggrieved party one year in which to appeal from a judgment, under the provisions of sec. 3049*a* it is deemed to have waived that right unless the appeal is hastened under the circumstances therein mentioned. The situation arising under the provisions of sec. 3049*a*, therefore, is rather in the nature of a default than a statutory bar. While it is established in this court that the right of appeal is a statutory right, and a court has no power to authorize the taking of an appeal after the time fixed by statute therefor has expired (*Filer & Stowell Co. v. C., M. & St. P. R. Co.* 161 Wis. 591, 155 N. W. 118), courts have broad powers to relieve defaults. Whether such power is inherent or rests in statutory enactment we need not here inquire. The provision of sec. 3049*a* empowering the court to bring in additional parties authorized the order entered herein permitting *McManus* to take his appeal. We think the entry of the order was abundantly justified under the circumstances of the case. Certainly it will greatly expedite the final determination of the controversy, and the failure of *McManus* to take his appeal was not entirely unreason-

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able, as the judgment entered in the circuit court was in his favor.

It seems proper to suggest, however, that where a defendant secures an order bringing in a third party who, he claims, will be liable over to him in case he is held liable in the original action, upon an appeal from a judgment in his favor he should also appeal from that portion of the judgment dismissing his cross-complaint. If the object of the practice of bringing in a third party under such circumstances is to be accomplished, manifestly both controversies should be kept together, and when the main controversy is brought by appeal to this court, orderly practice requires that the controversy raised by the cross-complaint against the impleaded party should also be brought up on appeal, so that this court may by its mandate terminate the entire controversy.

The other grounds upon which the motion to dismiss is based are not of sufficient merit to require discussion. The motion is denied.

Upon the merits, *McManus* is entitled to judgment against the *Vogel Real Estate Company* for the amount of his disbursements as fixed by the court. One who delivers a writ to a sheriff for service and execution is liable to the sheriff for the amount of his lawful fees and charges therefor. *Addington v. Sexton,* 17 Wis. 327. A proper execution of a writ of restitution requires the sheriff to remove all personal property belonging to the tenant from the premises. 19 Cyc. 1175; 24 Cyc. 1452. See, also, *Gaertner v. Bucs,* 109 Wis. 165, 85 N. W. 388. It is argued that the sheriff should not have incurred such a large bill of expense without some further authorization from the *Vogel Real Estate Company.* We fail to appreciate the force of this contention. The *Vogel Real Estate Company* caused the writ to be delivered to the sheriff. This not only authorized but commanded the sheriff to remove all personal property from

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the premises. The *Vogel Company* knew the character of the property which it was necessary to remove and that assistance would be necessary to execute the writ. If the ordinary execution of the writ was not desired, the *Vogel Company* should have so informed the sheriff. In the absence of such intimation from the *Vogel Company,* a proper discharge of his legal duties required the sheriff to remove the property.

The only further question in the case is whether the statute provides for the reimbursement of the sheriff for expenses incurred in the removal of the property. The *Vogel Company* contends that the statute makes no such provision therefor. It is said that the writ of restitution was issued by the civil court of Milwaukee county pursuant to its jurisdiction of justice of the peace. This is correct. It is also said that the constable is the ministerial officer of the justice of the peace, and that there is no provision in the schedule of constable's fees for reimbursement for expenses incurred in the execution of a writ of restitution. This also seems to be correct. Sec. 59.28, Stats., however, provides that "every sheriff shall be entitled to receive the following fees for his services, except for services in actions or proceedings before justices of the peace, for which fees are specially provided by law." In serving writs issued out of justices' courts the sheriff is confined to the fees prescribed for constables where such fees are provided. Where such fees are not provided, however, he is entitled to charge the fees prescribed in sec. 59.28, sub. (24) and (25) of which (quoted in the main opinion) provide for his reimbursement for all necessary expenses incurred in the execution of a writ such as this. *Cutts v. Rock Co.* 58 Wis. 641, 17 N. W. 636. And by virtue of the provisions of sec. 2959 a constable would be entitled to a similar charge for his disbursements in executing a writ of restitution. While the schedule of constable's fees contains no express provision for disbursements

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incurred in the service of any writ except for those made for board and conveyance of persons, which is to be settled by the county board, nevertheless, sec. 3779, relating to costs and fees in courts of justices of the peace, provides that

"No disbursements to officers or others shall be allowed unless the items are particularly specified and proved to the justice and the same were in his opinion necessary and reasonable in amount; and the justice may hear any evidence which may be offered to prove any charge is unreasonable or that the service has not been rendered."

This is a clear recognition that constables are entitled to their disbursements under some circumstances, and as there is no express provision in the schedule of fees to reimburse constables it must be referable to the schedule of fees provided for sheriffs under the provisions of sec. 2959.

As already appears, the civil court passed upon the reasonableness of this charge. This it presumably did pursuant to sec. 3779. At any rate, it is in accordance with the practice indicated in *First Nat. Bank v. Kickbusch,* 78 Wis. 218, 47 N. W. 267. The record as now before us plainly reveals the right of the sheriff *McManus* to recover the amount of his disbursements as so fixed by the civil court from the *Vogel Real Estate Company,* and the mandate of the court should direct that judgment be entered in his favor for the sum of $1,327.55 on his cross-complaint against the *Vogel Real Estate Company.*

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in favor of the plaintiff and against the defendant *McManus* in the sum of $1,327.55 and in favor of the defendant *McManus* against the *Vogel Real Estate Company* upon the cross-complaint of the said defendant *McManus* against said *Vogel Real Estate Company* for the sum of $1,327.55.

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SANDER and others, Appellants, vs. NEWMAN and others, Respondents.

January 14—May 31, 1921.

Joint adventurers: Formation: Partnership distinguished: Intent of parties: Duty of good faith between members: Fiduciary relation: Secret profits: Recovery: Fraud and deceit: When action accrues: Limitation of actions.

1. In the law of partnership the element of contract between the parties associated to form a copartnership, in the proper sense of the term, is a fundamental requisite.
2. Partnership contracts, like other contracts, are governed by the intent of the parties; and the generally accepted test as to whether a partnership exists is that a partnership is formed when the parties involved in the transaction have the intention that they should be partners.
3. A joint adventure may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; and each has a right to demand and expect from his associates good faith in all that relates to their common interest.
4. Where two persons, one having an option to buy land on terms of part payment in cash, found a purchaser for the land at an increased price but on terms of annual payments with no cash down, and, being unable to handle the option, joined two other associates, and the four opened a subscription list and others were induced to subscribe, one of the four being made trustee, the relation between all the parties was not a partnership but a joint adventure.
5. The four associates, being fiduciaries in relation to all the other subscribers, became responsible to them in damages for fraudulently representing the price for which the lands might be purchased and the profit at which they might be resold, and the subscribers may recover the amount of the secret profits secured and retained by the fiduciaries.
6. A claim for damages because of fraud in collecting and appropriating secret profits was enforceable in a legal action when the wrong was consummated, and the statute of limitations (sec. 4222, Stats. 1911) applies and is a bar to this action to enforce a claim arising out of such a fraud committed over six years before the action was begun.

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7. The fact that one of the defendants acted as trustee in handling the money and property of the syndicate does not make him accountable for the property irrespective of the six-year statute of limitations, as the right of action against him does not spring out of his relation as trustee to the members of the syndicate, but out of his fraudulent conduct; and an action against him is not one of that class of actions relief for which was "on February 28, 1857, cognizable solely by the court of chancery," and hence within the exception of sub. (7), sec. 4222, Stats.
8. The statute of limitations may be invoked against an action in equity as well as against one at law, if the cause of action constitutes a legal liability enforceable as such in law or equity. *Boyd v. Mutual Fire Asso.* 116 Wis. 155, followed.

APPEAL from an order of the circuit court for La Crosse county: A. H. REID, Circuit Judge. *Affirmed.*

The action was brought for an accounting of funds alleged to be in the hands of certain of the defendants and the *La Crosse Land & Investment Company.* Demurrers to the amended complaint were interposed by three of the defendants upon the ground that it appears upon the face of said complaint that the cause of action was barred by the statute of limitations, sec. 4222 of the Wisconsin Statutes. The demurrers were sustained.

The complaint alleges, in substance, that defendant *Gideon E. Newman,* in 1910, procured an option to purchase from the Musselshell Valley Land Company 13,261.64 acres of land in Montana at the price of $7.15 per acre, payable one fourth down and one fourth each year for three successive years; that defendant *Dow* became associated with defendant *Newman* to assist him in finding a purchaser; that together they found a purchaser, Wheelock & Wheelock, a corporation, which was willing to purchase the lands at $10 per acre without any cash payment down, but with payments in three annual instalments; that being unable to finance the deal themselves, *Newman* and *Dow* associated themselves with the defendants *Morris* and *Lyons,* and the four together agreed to raise the money by subscriptions to

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an enterprise to buy the land under the option and to sell it to the proposed purchaser. The complaint further alleges that they represented to the persons who subscribed to said syndicate that the purchase price of the land in question was to be $8.50 per acre, whereas in reality it was $7.15; that the cash payment required was $41,608.39 instead of $23,705.18; that the selling price to Wheelock & Wheelock was to be $9.50 per acre, when they really intended to sell it for $10 per acre; that the defendants *Newman, Dow, Morris,* and *Lyons,* by means of the above mentioned misrepresentations, induced the plaintiffs, other than plaintiff *Holley,* together with a certain number of defendants and persons deceased, to furnish capital in specified amounts to the enterprise, and that such agreement was evidenced by a written subscription; that such plaintiffs, together with defendants *Newman, Dow,* and *Lyons* and three "dummies," *O'Connor, Baker,* and *Appleby,* signed such subscription list, each for a separate amount, in all totaling $42,000, which it was represented would pay the cash payment of $41,608.39 and leave a few dollars for expenses in handling the deal; that the subscribers paid in cash $29,600 and the defendants *Lyons, Dow, Newman,* and *Morris* and their dummies paid nothing.

It is further alleged that defendant *Morris* was made trustee for all of the persons interested; that, as such trustee, *Morris,* on April 6, 1910, made a contract with the Musselshell Valley Land Company and Wheelock & Wheelock for the purchase of the lands; that this contract falsely stated that the cash payment was to be $41,608.39, when in truth and fact such payment was $23,705.18; that *Morris,* as such trustee, received a receipt from the Musselshell Valley Land Company purporting to acknowledge the payment of $41,608.39; that thereby the defendants were enabled to retain their interest in said syndicate without paying anything, besides leaving $5,894.72 in *Morris'* hands. It is also

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alleged that on the same day the defendant *Morris,* as trustee, made a contract to sell the lands to Wheelock & Wheelock at the actual price of $10 per acre, but executed a contract in writing by which it was made to appear that the selling price was $9.50 per acre, the difference being made good by Wheelock & Wheelock giving their two promissory notes aggregating $6,630.50, which the conspiring defendants appropriated to themselves; that the plaintiffs and their associates, who were deceived in the above stated manner, did not discover the truth regarding the aforesaid facts until about May, 1916.

The complaint further alleges that at the time of the transactions on April 6, 1910, *Morris* did not have any written contract with the members of the syndicate defining the terms of the trust under which he was acting and that none had been prepared before that date; that on April 6th the representatives of the Musselshell Valley Land Company and Wheelock & Wheelock insisted that a written agreement should be prepared and executed by *Morris* and the members of the syndicate for which he acted; that such a document was afterwards prepared and executed; that on April 13, 1910, a corporation was organized, known as the *La Crosse Land & Investment Company,* to succeed *Morris* as trustee and to take over his title and duties; that at this time the following resolution was adopted: "Resolved, that the assignment executed by *Thomas Morris,* trustee, be and is hereby accepted; that the president and secretary be and hereby are directed to issue stock in payment for said contract to the parties for whom *Thomas Morris* has been acting as trustee." The complaint avers that, although the above resolution recites that an assignment of these contracts had been executed, such assignment had not in fact been executed nor was ever executed.

It is further alleged that at the time of the adoption of said resolution such of the *bona fide* subscribers to the syn-

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dicate agreement who were then present had no knowledge of the fact that the land had been bought by *Morris* as trustee for $7.15 per acre and resold by him for $10 per acre; that no such consent to an assignment by *Thomas Morris,* trustee, of the contracts of purchase and sale entered into by him as such trustee was ever given by the Musselshell Valley Land Company or Wheelock & Wheelock; that *Edward Lyons* became president of the company and *Thomas Morris* secretary, and as such officers issued certificates of stock to the various members of said syndicate or partnership for their respective interests in the deal, including the defendants and their dummies; that the new corporation, while yet under the control and officered by two of the defendants, carried out both contracts, receiving the money due on the one contract from Wheelock & Wheelock and paying out the money due on the other contract to the Musselshell Valley Land Company; that since such transaction the corporation has performed no other business than to distribute certain surplus money among the stockholders; that it had in its possession at the time of bringing this action, undistributed, about the sum of $14,500.

The complaint further alleges that the payment of the purchase price of the land by *Thomas Morris,* or his successor, the corporation, was not completed until about the month of July, 1913, and that the Wheelock & Wheelock contract of April 6, 1910, was not fully executed and completed until about December 1, 1916, at which time said parties finished payments for the land; that *Morris* had never been discharged or released by the members of the syndicate from his duties and obligations as trustee, nor has he ever made a report or accounted to them for his acts and doings as trustee; that he still has or should have in his possession as such trustee the sum of $5,894.72, or thereabouts, of the original trust funds paid into his hands by members of the syndicate; that as trustee *Morris* had notice

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and knowledge of the giving of the two notes by Wheelock & Wheelock to defendants *Dow* and *Newman,* representing the difference between $9.50 and $10 per acre, aggregating $6,630.50, and that the proceeds thereof are part and parcel of the trust fund intrusted to his care and custody, for which he has never accounted to members of the syndicate; that defendants *Morris* and *Lyons* received from the *La Crosse Land & Investment Company* each the sum of $3,628.94, part and parcel of the trust funds arising from the sale of lands hereinbefore described; that defendant *Newman* on August 6, 1910, and ever since, has been a nonresident of the state of Wisconsin; that defendant *Appleby* is and for some years has been a nonresident of Wisconsin; that this suit was commenced May 16, 1918.

Relief is prayed for as follows: (1) That the rights of each member of the syndicate to the property, assets, and business thereof shall be determined by the court; (2) that an account be stated in accordance with the principles of equity among and between all, each, and every member of the syndicate and the just and true share of each and every member to the fruits of the enterprise be determined; (3) that defendants *Newman, Dow, Lyons,* and *Morris* be compelled to account for any or all moneys or securities obtained by them, or either of them, out of trust funds part and parcel of the proceeds growing out of the purchase and sale of said land; (4) that the business and affairs of said syndicate conducted through the agency of *Thomas Morris,* trustee, and the *La Crosse Land & Investment Company* as successors in trust, be declared settled, and that a just and equitable distribution be made of the money remaining in said trust funds to the persons and parties found entitled thereto; and (5) for such other and further relief as equity may require and the facts warrant.

For the appellants there was a brief by *C. W. Graves* of Viroqua, attorney, and *Bulkley, More & Tallmadge* of Chi-

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cago, of counsel; and the cause was argued orally by *Mr. Almon W. Bulkley* and *Mr. Graves.*

Frank Winter of La Crosse, for the respondent *Morris.*

For the respondent *Lyons* there was a brief by *Lees & Bunge* of La Crosse, and oral argument by *Andrew Lees.*

For the respondent *Dow* there was a brief by *Gilbert & Ela* of Madison and *Arthur T. Holmes* of La Crosse, and oral argument by *Mr. Frank L. Gilbert* and *Mr. Holmes.*

The following opinion was filed March 8, 1921:

SIEBECKER, C. J. This is an action to recover funds from the defendants *Newman, Dow, Morris,* and *Lyons* which, it is alleged, they fraudulently obtained and appropriated to their own use out of the proceeds realized on the sale of the lands described in the complaint in the manner set forth in the foregoing statement of facts. The alleged grounds of recovery are that these four defendants entered into a conspiracy to retain secret profits out of the amount paid for the lands, aggregating the sum of $24,533.71. It is alleged that they obtained the sum in the form of cash, notes, and in paid-up interests in the lands purchased from the Musselshell Valley Land Company and sold to the Wheelock & Wheelock corporation on April 6, 1910. The alleged facts set out an executed conspiracy and that it was carried out by misrepresentations and fraudulent concealments by the four designated defendants and that the plaintiffs and others were thereby defrauded out of their just shares of the profits of this land deal. The action is planted in equity, and the complaint proceeds upon the idea that the facts alleged show that the arrangement entered into by all the parties to the land transaction constituted a partnership and all of the subscribers to the syndicate members thereof. An examination of the facts fails to show that the parties intended to form a partnership. In the law of partnership the element of contract between the persons associated to form a co-

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partnership in the proper sense of the term is a fundamental requisite. The facts of the alleged transaction do not establish the fact that the parties had such an understanding in this undertaking. Partnership contracts, like other contracts, are governed by the intent of the parties, and the generally accepted test of whether or not a partnership exists is that a partnership is formed when the parties involved in the transaction have the intention that they should be partners. 20 Ruling Case Law, p. 831, § 36. For as there pointed out: "Every partnership rests on the mutual consent of its members." The general scheme of the syndicate, the manner of conducting its business from its inception to its conclusion, negatives the idea that the subscribers apprehended or thought of forming a partnership in the true and proper sense of the term. We are convinced that no partnership was intended and that the transactions of the parties do not establish a partnership between the subscribers to the syndicate. The transaction was in substance a "joint adventure."

"A 'joint adventure' may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests." *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130.

The relation to such an adventure is fiduciary in its character, and each co-adventurer is obligated to his associates to deal in good faith in all matters pertaining to their enterprise. The relationship of the parties to such an adventure has been repeatedly recognized in the decisions of this court. See the cases cited in the opinion of the court in *Goldman v. Cosgrove*, 172 Wis. 462, 179 N. W. 673. It is there declared:

"When one becomes a member of a group or association of individuals united for the purpose of prosecuting a joint

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or common enterprise, such as the purchase of property, each member of the group owes to every other member thereof the duty of fair, open, and honest disclosure, and no member thereof can by connivance, deceit, or suppression of facts within the right, or to the advantage of every other member thereof to know, procure or accept secret profits, commissions, or rebates to the disadvantage of his co-adventurers. . . . A violation of his duty in that regard constitutes actionable fraud, and the usual remedies for the redress of fraud are available."

It is clear from the facts pleaded that the plaintiffs and defendants in this case did embark in an undertaking without forming a partnership, but for the mutual benefit of buying and selling the land on which *Newman* had an option, and to sell it to the Goodrich corporation at a profit, which was to be divided between them in proportion to the subscription they made to provide the fund to consummate the purchase and sale. Since the four defendants who are alleged to have received a secret profit out of the deal were fiduciaries in relation to all the other subscribers, they became responsible in damages to such other subscribers for the alleged fraudulent concealment and deceit. Viewing the complaint in the light of its allegations, it in substance and effect sets forth a claim, as the circuit court held, ". . . to recover from the four alleged conspirators the amount of secret profits which it alleged they obtained by fraud and deceit, whereby each of the plaintiffs suffered a wrong and proportionately were deprived of moneys to which they were entitled." The remedy appropriate to redress such a wrong has been repeatedly applied in cases that have come before this court. In *Jones v. Kinney,* 146 Wis. 130, 131 N. W. 339, an action was sustained to recover damages for fraud in receiving secret profits in the sale of a lease of oil-bearing lands by some of the co-adventurers. To the same effect is *Goldman v. Cosgrove,* 172 Wis. 462, 179 N. W. 673, and cases there cited. See, also, *Church v. Odell,* 100 Minn. 98, 110 N. W. 346.

We think the facts as pleaded, and which must be assumed

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to be true on demurrer, constitute a cause of action in favor of the plaintiffs to recover any damages they sustained as the result of the alleged fraud by the four conspiring defendants in collecting secret profits and appropriating them to their own use and benefit. Such a claim was clearly enforceable in a legal action, and the right to sue thereon arose when the wrong was consummated, namely, April 6, 1910. In principle, then, the complaint presents a case like that of *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342. The question arises: Do the statutes of limitation as embodied in sec. 4222 apply to the alleged cause of action? It was there held that promoters concerned in buying land at a given price and "turning the same over to a corporation to be formed, at a much greater price, and to induce others to come into the corporation in ignorance of the facts, and such others contributed the actual capital necessary to fully accomplish the purpose of the promoters, the corporation, both before and after the adoption of the Code, had a remedy at law to enforce the liability of the promoters to refund to the corporation their profits." The application of the statute of limitations to such a cause of action was there most elaborately discussed, and it was held that such a cause of action is barred by the six-year statute of limitations. The cause of action in that case is of the same nature and kind as the cause of action alleged in the complaint in this action. The claim as alleged here is admittedly one arising out of alleged fraudulent conduct by the fiduciaries and hence is in its nature a legal claim, arising out of and produced by the deceit, and is in fact damages flowing from fraud.

The appellants seek to distinguish the liability of *Morris* from one for damages for deceit and fraud upon the ground that he acted as trustee of an express trust and hence is accountable as such in equity for the funds that came into his hands and therefore all causes of action against him were

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not subject to the six-year statute of limitations. The fundamental error of this claim is that the right of action alleged in the complaint, as above shown, is in its nature a legal one, which the co-adventurers under the law of this state had the right to enforce against him at any time after the fraud was committed, and hence is not one of that class of causes of action "for relief on the ground of fraud in a case which was, on and before the twenty-eighth day of February, A. D. one thousand eight hundred and fifty-seven, cognizable *solely* by the court of chancery." Sub. (7), sec. 4222, Stats. The alleged right against *Morris* does not spring out of his alleged relation of trusteeship to the plaintiffs as members of the syndicate but out of the alleged fraudulent conduct. Such a cause of action against him constitutes a legal liability enforceable as such in law or equity. The fact that this action is planted in equity does not affect the right to invoke the statute of limitations against its enforcement. "The application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of the relief demanded." *Boyd v. Mut. Fire Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171. The policy of applying the statute of limitations respecting causes of action of the nature sought to be enforced against *Morris* as trustee is declared by the court in the *Boyd Case* in the following language:

"We feel induced to hold that as neither the statute nor the precedents of this court warrant exception from the protection of the limitation statutes of those who, though holding as fiduciaries and trustees, have at all times been liable to remedy by suit at law for their misconduct as such, we may not with propriety take from them that protection which the statute, in terms, gives."

We find that the trial court was right in holding that the alleged fraudulent conspirators were liable in a legal action for the wrongful conduct of obtaining secret profits out of

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the joint adventure, and that such alleged cause of action accrued more than six years prior to the commencement of this action, and hence the cause of action alleged in the complaint is barred by the six-year statute of limitations.

By the Court.—The order appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on May 31, 1921.

HEMPEL, Respondent, vs. HEMPEL, Appellant.

February 10—May 31, 1921.

Marriage: Annulment: Fraud, force, or coercion: Confirmation of marriage: Mental capacity of parties: Test: Judgment annulling marriage: Right to appeal: Jurisdiction of court.

1. In a husband's action to annul his marriage, testimony that the wife, her mother, and her brother told him that he must marry the wife, and that he married because she and her mother were insistent and out of pity for her, is *held* not to support a finding that fraud, force, or coercion had been used to induce the husband to marry, under sub. (4), sec. 2351, Stats., stating grounds for the annulment.
2. The husband, by cohabiting with his wife for six months after marriage, confirmed the marriage even though it had been procured by fraud, coercion, or duress, and was precluded from having it annulled under sub. (4), sec. 2351.
3. The test as to whether a marriage can be annulled because of mental incompetency under sub. (5), sec. 2351, providing for annulment of a marriage entered into with such want of understanding as renders either party incapable of assenting to marriage, is whether the want of understanding rendered the party at the time incapable of assenting or consenting to the making of such a civil contract which marriage is defined to be by sec. 2328, and not whether the party had sufficient mentality to sufficiently measure up to the responsibilities incurred by bringing offspring into the world, notwithstanding secs. 4593*m* and 4593*n*, prohibiting a sane person from intermarrying with a person who is insane, mentally imbecile, feeble-minded, or epileptic, and providing that no

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one shall solemnize a marriage to which such a person is a party, as these statutes do not extend the power of the court beyond the limits set forth in sec. 2351, but only provide a penalty for sane violators of the provisions.

On rehearing:

4. Failure to raise the objection that there is no right of appeal to the supreme court from a judgment annulling a marriage, until after the decision of that court, or even the respondent's express or implied consent to have the hearing, would not confer jurisdiction on the supreme court if in fact there is no right of appeal.
5. An appeal from a judgment annulling a marriage is an appeal from a judgment in a civil action, and the right to an appeal is included in the general statute providing for appeals (sec. 3039, Stats.).
6. Sec. 3041 does not grant or create a right of appeal, but provides an additional limitation within which an appeal from a judgment in a divorce action may be taken.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

This action was commenced May 12, 1919, to annul a marriage of June 26, 1917.

The amended complaint alleged as a first cause of action that at the time of the marriage the defendant was mentally incompetent and an imbecile; that the plaintiff was ignorant of such condition and that the defendant and her mother through trickery induced the plaintiff to marry the defendant; that the defendant, being mentally incompetent, had no right to enter into a marriage relation; that by virtue of such fraud the plaintiff became and is the husband of the defendant, and prays that the marriage be annulled on the ground of fraud.

For a second cause of action, that the defendant wilfully deserted the plaintiff on or about May 8, 1918.

The relief prayed for was either that the marriage be set aside or a divorce granted. There was a general denial by defendant as to each cause of action.

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The findings of fact included the following:

"The court finds that at the time of said marriage the defendant was mentally incompetent and an imbecile, and did not have sufficient mental capacity to understand the marriage relation, and that the plaintiff was induced to marry said defendant through fraud and deception on the part of the defendant and her mother.

"The court finds that the plaintiff did not know of said mental incompetency at the time of said marriage, and believed that the defendant was sound of mind.

"The court finds that the plaintiff and defendant were not well acquainted and that the plaintiff lacked opportunity to observe and know the true mental condition of the defendant."

The judgment determined that the marriage be set aside and annulled and both parties completely freed from all obligation thereof, that the records concerning said marriage be expunged and it be declared void. From such judgment the defendant has appealed.

For the appellant there was a brief by *Dillett & Fischer* of Shawano and *F. Y. King* of Tigerton, and oral argument by *Mr. King.*

For the respondent the cause was submitted on the brief of *Eberlein & Larson* of Shawano.

The following opinion was filed March 8, 1921:

ESCHWEILER, J. The claim by plaintiff in his original complaint and renewed in the amended complaint for a divorce on the ground of desertion was apparently abandoned by him on the trial and no findings made with reference thereto by the court.

The defendant was at the time of the trial about twenty-seven years of age; the plaintiff's age does not appear. Plaintiff had known defendant some two years prior to the marriage in 1917 and had corresponded with her during

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that period. He had visited at her home about twice within the two months preceding the marriage. She had also visited at his home.

Testimony was received from three physicians, one of whom had known the defendant from early childhood. The testimony of the latter is to the effect that the defendant has ideas which are not corresponding with the normal active brain, and while he would not call her directly insane he would call her feeble-minded, and that a home for the feeble-minded would be the proper place for her; that her condition is of long standing; that from his knowledge and examination he would say that she is absolutely not a proper person to be married and have the cares of motherhood; that physically and mentally she would not be responsible for the child. The child would not be led intelligently, and she could not give the proper mental training to the child.

Another physician who examined her at the time of the trial classified her as mentally weak and that the proper place for a person in her condition is in some home for the feeble-minded; that she is hardly fit to give birth to a child; that her offspring would be very apt to be of a feeble-minded character unless the father was an exceptionally bright man mentally; that her case is one where the brain has never developed. She is a child in a good many respects.

The third physician who was called as a witness for the defendant and who had examined her just before the trial testified that she was feeble-minded, with a type of insanity which he called melancholia; that he did not believe she has mental development; that he did not think she is of sufficient understanding to know to a greater or less degree the responsibilities of marriage; that the degree of feeble-mindedness is very slight.

The plaintiff testified that shortly prior to the marriage the defendant, her mother, and defendant's brother-in-law

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met him when he was working on the road and told him he must marry the defendant; that shortly afterwards he accompanied the defendant to the county seat for the purpose of giving additional data needed for the obtaining of the marriage license; that he then returned to his own home and within a day or two thereafter went to defendant's home and was there married. The plaintiff suggests that he married the defendant because she and her mother were insistent that he should and that out of considerations of pity for her he did agree to do so.

After the marriage the two lived together in their own home for at least six months. Plaintiff then went to work in the woods and the defendant went to live with her sister. The plaintiff was then drafted in the army and was in service from July 22, 1918, to February 10, 1919. The plaintiff on entering the service tried to arrange that the allotment pay for the support of the family should be paid to his mother rather than to the defendant. She, however, was able to have it so provided that payments were made to her amounting to about $200 during the time of his service. He contributed nothing else to her support during this time. While in the service he wrote to her and made what he admits was a false statement to the effect that he was keeping company with some other woman, and this was, as he says, for the avowed purpose of inducing her not to pester him any longer; that he desired in this manner to get rid of her. He did not visit her after his return from the army, and during the pendency of this action paid a portion only of the alimony provided for by order of the court.

Plaintiff also testifies that he did not know of her mental condition at the time of the marriage, but did ascertain the same within two weeks after the marriage; that it was disclosed to him by what he designates as spells, one of them in particular in which she claims she saw the furniture

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moving about. She testified as to the same occurrence and said it was no more than the recital to him of a dream that she had. He testified also as to a violent scene he had with her the day following the marriage. She testified as to the same occurrence that it was anger on her part at his boasting to her of some former sweetheart.

It conclusively appears, however, in this record that after his obtaining knowledge of her lack of mental capacity as early as two weeks after the marriage he nevertheless continued to cohabit with her, accepted money from her for the purchase of some of the household furniture and for their support, permitted her to handle the family funds, accepted her domestic services, and permitted her to assist in work in the field with him on his father's farm. She suffered two miscarriages during her married life, one in January following the marriage, and the second in the following October.

There is no suggestion in the record of any sexual relations between her and the plaintiff before marriage or of even any improprieties by her with any other man at any time.

To support this judgment warrant for it must be found under the statute granting power to the circuit court to annul marriages for certain causes existing at the time of the marriage. The parts of the section which are material here are as follows:

"Section 2351. . . .

"*Fraud, etc.* (4) Fraud, force, or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party.

"*Insanity.* (5) Insanity, idiocy, or such want of understanding as renders either party incapable of assenting to marriage, at the suit of the other, or at the suit of a guardian of the lunatic or incompetent, or of the lunatic or incompetent on regaining reason, unless such lunatic or incompetent,

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after regaining reason, has confirmed the marriage; provided that where the party *compos mentis* is the applicant, such party shall have been ignorant of the other's insanity or mental incompetency at the time of the marriage, and shall not have confirmed it subsequent to such person's regaining reason."

We can find no support for the relief granted by the trial court in this case under any authority granted by sub. (4) just above quoted. There is no evidence here which would support a finding that either fraud, force, or coercion had been used as against the plaintiff in order to induce the entering into the marriage. Not a particle of evidence that any concealment of or any misrepresentation as to her mental condition was attempted or made. There is no showing here of fraud such as would support a judgment of annulment. *Behsman v. Behsman,* 144 Minn. 95, 174 N. W. 611, 7 A. L. R. 1501. If any such had been used, his cohabiting with the defendant would have been such confirmation of the marriage as would have taken away his right to have it annulled on any such grounds.

There was no finding made, or evidence which would have supported a finding, of either insanity or idiocy such as is specified in sub. (5), *supra,* existing in the defendant at the time of the marriage ceremony. No question can therefore arise here as to the effect that should be given to the language, "No insane person, epileptic or idiot shall be capable of contracting marriage," as found in sub. (1), sec. 2330, Stats., defining the classes of persons who shall not marry.

There is left but one possible ground upon which this judgment can be supported, namely: Was there in defendant at the time of the marriage "such want of understanding" as rendered her "incapable of assenting to a marriage?" The findings of the trial court were not framed to and do not meet that condition so prescribed by the statute.

Sec. 2328, Stats., reads: "Marriage, so far as its validity

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in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential." This particular marriage ceremony cannot be annulled upon the ground claimed here by plaintiff to be presented under said sub. (5), sec. 2351, *supra,* unless defendant's want of understanding rendered her at the time incapable of assenting or consenting to the making of such a civil contract as marriage is declared to be. The law has not declared that this is to be tested by determining whether the parties thereto are of sufficient mentality to measure up to the responsibilities incurred by bringing offspring into the world, but solely on the question as to whether or not there was understanding and mental capacity sufficient to realize what was then being done and consenting thereto. *Baughman v. Baughman,* 32 Kan. 538, 4 Pac. 1003; *Adams v. Scott,* 93 Neb. 537, 141 N. W. 148; *Coleman v. Coleman,* 85 Oreg. 99, 166 Pac. 47; *Van Haaften v. Van Haaften,* 139 Mich. 479, 102 N. W. 989. See, also, note to 38 L. R. A. N. S. 819.

The evidence in this case clearly discloses that the defendant was capable of assenting to and did assent to marry the plaintiff. She testified that plaintiff wrote her and told her that if he couldn't marry her he would hang himself; that she didn't want him to do that; that she loved him then and does yet. She says they married because "he wanted me and I wanted him." We doubt if Eve in her pristine innocence or any other of her daughters of today, however mentally gifted, could have better expressed more concisely or accurately the idea of mutual consent to marriage. It is the plaintiff who harks us back to the time of Kavvah by his Adam's plea that the woman gave me of the tree and I did eat, but, without the courage of Adam to stand by his woman, he now, after long tasting, seeks to eschew. The evidence is clear and satisfactory that she appreciated that she was to forsake all others and remain faithful unto him. There is no evidence in the record to indicate that her mind,

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however much like that of a child it might be, did not appreciate such obligations or that she did not continue to bear them in mind and live up to them.

The respondent further contends that this marriage should be annulled by the effect to be given to the following statutes:

"Section 4593*m*. (1) No man and woman, either of whom is insane, mentally imbecile, feeble-minded or epileptic, shall intermarry.

"(2) No person authorized to solemnize marriages shall unite in marriage any man and woman either of whom is insane, mentally imbecile, feeble-minded or epileptic, nor shall any person advise, aid, abet, cause or assist in procuring or countenancing any violation of this section."

"Section 4593*n*. Any sane person violating any of the provisions of section 4593*m* shall, upon conviction, be deemed guilty of a misdemeanor and be punished by a fine of not less than fifty dollars nor more than one hundred and fifty dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment."

The provisions of these statutes, however, are not to be construed as giving a court any further or wider power in annulling a marriage than is to be found within the provisions of sec. 2351, *supra*. The penalty in sec. 4593*n* expressly provides a punishment against the sane violator of sec. 4593*m*, not against the unfortunate individuals.

It has expressly been held that a marriage made by such persons as are so specified in sec. 4593*m*, *supra*, is not for that reason void. *Estate of Jansa*, 169 Wis. 220, 171 N. W. 947.

While it is true, as has often been said, that the state is in a large measure an interested third party to the marriage contract as a conservator of the public welfare, yet it has marked out by statutory declaration the limits within which its courts may act with reference to this relationship, and within those limits courts must remain. The right of the

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state to care for the feeble-minded is in nowise impaired by a result such as is here reached.

The plaintiff as one party to such marriage contract, not being found to be within the situation contemplated by the statute giving authority to the circuit court to annul a marriage, is not entitled to the relief granted him by the court below.

It follows therefrom that the judgment must be reversed and the complaint dismissed.

By the Court.—Judgment reversed.

The following opinion was filed May 31, 1921:

PER CURIAM. Upon respondent's motion for a rehearing in this court he now suggests, and for the first time, want of jurisdiction in this court to entertain the appeal upon the claim that the judgment in the court below annulling the marriage is one from which there is no right of appeal.

If this contention be correct, mere failure on his part to raise the question earlier, or even his express or implied consent to have the matter heard, as it has been, would not give this court jurisdiction and no other action could be properly taken than a dismissal of such an attempted appeal. *Wis. R. E. Co. v. Milwaukee,* 151 Wis. 198, 201, 138 N. W. 642; *Wildes v. Franke,* 157 Wis. 189, 190, 146 N. W. 1119; *Puffer v. Welch,* 141 Wis. 304, 124 N. W. 406.

This action is one of the several kinds of actions provided for in ch. 109, Stats., entitled "Divorce," and jurisdiction is conferred upon the circuit court by sec. 2348 in providing for actions to affirm or annul a marriage, for divorce from the bond of matrimony, or from bed and board; and said section also provides:

"All such actions shall be commenced and conducted and the orders and judgments therein enforced according to the

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provisions of these statutes in respect to actions in courts of record, as far as applicable, except as provided in this chapter."

The only provision to be found in this chapter on the subject of appeal is found in sec. 2374, and by sub. 4 thereof provision is made for review of a *judgment of divorce* by appeal.

In sec. 2351, providing for the kind of action that was brought here, namely, for the annulment of a marriage, nothing is found relating to reviews in this court of such judgments, and the same is true as to the proceedings to affirm a marriage under sec. 2352.

By ch. 132 of the Statutes provision is made for writs of error and appeals to this court. Sec. 3039, so far as material here, provides as follows:

"The time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court *of any judgment* or order in any civil action or special proceeding in a court of record is limited to one year from the date of the entry of such judgment or order."

And then follow certain exceptions and conditions not material here.

As a part of the same chapter is found a provision relating to appeals in divorce actions, and this reads as follows:

"Section 3041. The time within which an appeal may be taken from *any order* modifying or revising a *judgment* of divorce, so far as it determines the status of the parties to the action, is limited to six months from the date of the entry of such order."

Before the enactment of ch. 239, Laws 1911, which with the prior enactment of ch. 323, Laws 1909, made substantial changes in the laws relating to divorce, this sec. 3041 and as it stood in the Revised Statutes of 1878, 1889, and 1898 provided for the same limitation of six months within which an appeal could be taken, not only from "*judgments* of di-

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vorce dissolving the marriage bonds," but also "from so much of a *judgment as annuls* a marriage." Respondent now contends that, inasmuch as in the old form of sec. 3041, as just above quoted, there was the express mention of an appeal from a judgment annulling a marriage, there was thereby given and created the right of an appeal from such judgment, and the subsequent revision of the divorce law and the striking out of the above quoted provision from sec. 3041 by ch. 239, Laws 1911, indicated a legislative intent to do away with any such theretofore recognized right of appeal.

We however do not deem it necessary to go further into detail of the changes made in the divorce law and of sec. 3041 because we are convinced that sec. 3041, *supra,* both before its amendment in 1911 and now, did not and does not grant or create any right to an appeal, but merely provided and provides for additional limitations than the time limitation mentioned in the general statutes providing for appeals. Sec. 3039, *supra.* The judgment here in question being manifestly a judgment in a civil action in a court of record, the right to an appeal therefrom is included in the provisions of sec. 3039, and, there being found no present exception or limitation as to this kind of judgment, there is no valid objection to the court's jurisdiction.

Upon all the grounds presented in the motion for a rehearing it must be denied, with $25 costs.

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JACOBI and another, Respondents, vs. RUBICON MALTING & GRAIN COMPANY, Appellant.

March 9—May 31, 1921.

Factors: Failure to sell: Contributory negligence not a defense: Damages: Market value: Sufficiency of evidence: Recovery of interest: Appeal: Mistrial as to one issue: Disposition of case.

1. In an action for breach of an agreement to sell plaintiffs' barley as instructed by them, contributory negligence was not an issue, since, if plaintiffs directed the defendant to sell, it became its duty to exercise reasonable diligence to execute the direction, while if no directions were given defendant was relieved of liability, not because of contributory negligence but because no duty was placed upon it to act.
2. Where it appeared that the barley could have been sold, after directions were given by plaintiffs, by May 8th, but there was no evidence as to the market price on that date and there was a sharply fluctuating market, evidence of the market price on May 2d and May 15th would not support a finding for plaintiffs.
3. Where all other issues were determined on competent evidence, but there was no sufficient evidence as to market value, the cause will be remanded with directions to take evidence on that issue, unless the parties stipulate as to the value, and to enter judgment accordingly.
4. The defendant having agreed to sell plaintiffs' barley, the law implied a promise to pay plaintiffs when it received returns on the sale, and interest was recoverable from such time without demand.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action for damages caused by the failure of the defendant, which had agreed to sell plaintiffs' barley consisting of about 812 bushels, to follow instructions given it as to the sale thereof. The cause was submitted to the jury upon a special verdict containing ten questions, only three of which were material to the issues, namely: (1) Did the plaintiffs give directions on April 17, 1918, to ship their barley? (2) After receiving such instructions, how soon,

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in the exercise of reasonable diligence, could the defendant have shipped it? and (3) the question of damages. The jury found that instructions to ship were given by plaintiffs on April 17, 1918; that within twenty-one days, or on May 8, 1918, the defendant in the exercise of reasonable diligence could have shipped the barley, and damages in the sum of $260. This item of $260 was in addition to $1.23 per bushel, amounting to about $990, the price at which the barley sold for July 13, 1918. The court awarded judgment to plaintiffs, with interest on both sums from July 13, 1918, and the defendant appealed.

For the appellant there was a brief by *Sawyer & Sawyer* of Hartford, and oral argument by *E. W. Sawyer.*

For the respondents there was a brief by *Russell & Foote* of Hartford, and oral argument by *J. C. Russell* and *J. J. Foote.*

The following opinion was filed April 5, 1921:

VINJE, J. The defendant argues the question of plaintiffs' contributory negligence at great length. It has no place in the case, and the court properly set aside the answer of the jury finding plaintiffs guilty of contributory negligence, both on the ground that there was no evidence, as he found, to sustain it, and on the ground that it was not an issue in the case. If plaintiffs gave defendant directions to sell the barley it became its duty to exercise reasonable diligence to execute such directions. If no directions were given, that would constitute no negligence on the part of plaintiffs affecting defendant's liability, though the failure to give such directions might relieve defendant of liability, not because of contributory negligence but because no duty was placed upon it to act.

We have carefully examined the evidence and reach the conclusion that it sustains the finding that plaintiffs ordered the barley sold on the 17th of April, and that in the exer-

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cise of reasonable diligence defendant could have shipped it within twenty-one days. That would have been by May 8th. There is no evidence as to the market price of barley on May 8th. The nearest dates are May 2d, when barley was worth from $1.68 to $1.79 at Milwaukee, and on May 15th, when it sold for $1.38 to $1.42 at the same place. The jury evidently took a mean between these prices, as they found the damages about thirty-two cents per bushel. This added to $1.23, at which it sold, would make the price $1.55 per bushel. As the market price at or near May 8th is not in evidence, the finding of the jury is not supported by sufficient evidence in view of the sharply fluctuating market.

Since all the other issues are determined upon competent evidence, the cause will be remanded with directions to take evidence as to the market value of barley on May 8, 1918, if the parties will not stipulate its value, and to enter judgment for plaintiffs for the price per bushel so found or stipulated, with interest thereon from July 13, 1918, when returns on the sale were had and when defendant offered to pay plaintiffs $1.23 per bushel for the barley, which they refused to accept, demanding more.

It is held in *Laycock v. Parker,* 103 Wis. 161, 185 *et seq.,* 79 N. W. 327, that when the amount of a demand can be fairly ascertained by reference to market prices, not necessarily by definite quotations on the board of trade, interest is allowable from the time of demand. In such case the law implies a promise to pay the whole amount when due and that if it is not paid legal interest can be recovered, because the defendant is enriched to that extent by the use of the money withheld and the plaintiff is deprived of the value of the use thereof which rightly belongs to him. Under the agreement between the parties the law implied that defendant would pay plaintiffs when it received returns on the sale of the barley. The case, therefore, irrespective of

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the demand that was made for more than $1.23 per bushel, falls within the class mentioned in *State v. Milwaukee,* 158 Wis. 564, on p. 574 (149 N. W. 579). It is there said:

"But where the time of payment is fixed by contract or by law and the amount to be paid is easily ascertainable and the duty to pay plain, no demand is necessary to start the running of interest, whether the claim be against an individual or a municipality." Citing *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *Land, L. & L. Co. v. Oneida Co.* 83 Wis. 649, 53 N. W. 491; *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 375, 74 N. W. 372, 78 N. W. 407; *State v. McFetridge,* 84 Wis. 473, 530, 531, 54 N. W. 1, 998.

By the Court.—Judgment reversed, and cause remanded for further proceedings as directed in the opinion.

A motion for a rehearing was denied, with $25 costs, on May 31, 1921.

TOWN OF MINOCQUA, Appellant, vs. NEUVILLE and another, Respondents.

March 10—May 31, 1921.

Dedication: Oral acceptance: Implied acceptance: Use of public moneys on highway: Dedication not joined in by all landowners.

1. Prior to the amendment of sec. 1294, Stats., by ch. 525, Laws 1913, an oral acceptance by a town board of a dedication of a public highway was lawful and binding.
2. The mere furnishing of funds by a town board for work upon a strip of land could not convert that which was a private easement into a public one, at least as to owners who had not joined in an attempted dedication to the public.
3. A private right of way could not become a public highway by dedication by the owners of but part of the strip used as such right of way.

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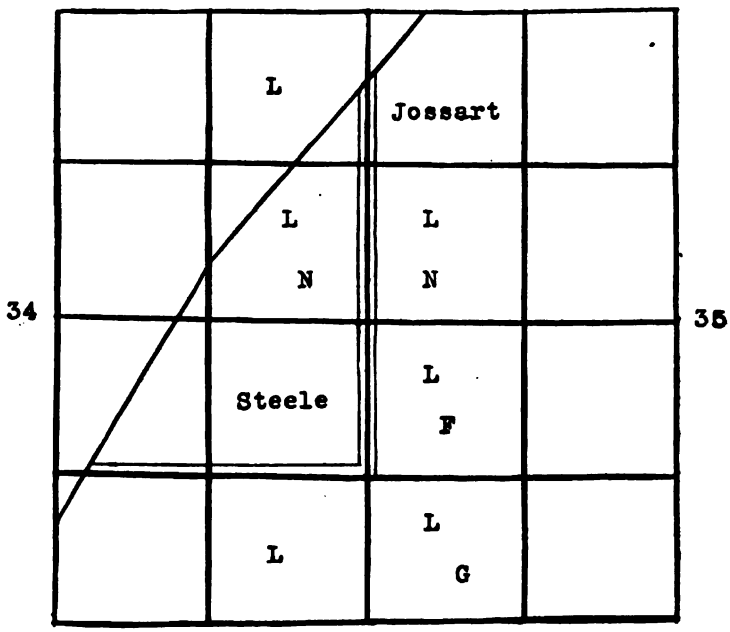
APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff town to restrain the defendants from plowing up and otherwise obstructing an alleged highway in said town. The following sketch shows the situation:



The diagonal line running through section 34 and a small corner of section 35 had for many years been a public highway known as the Minocqua-Hazelhurst road. In 1906 one Noble S. Lee purchased the several forties shown on the sketch marked L. At that time one Jossart was the owner of the forty marked Jossart, and one Steele of the forty marked Steele. Sometime thereafter Lee conveyed the forty marked F to his son Famous Lee and the one marked G to his son Grover Lee. The two forties marked N were sold by him to a son, Horace Lee, who in April,

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1915, conveyed the two to the defendants *Louis* and *Eli Neuville,* who continued in possession thereof and improved the same. The alleged highway in dispute is on a strip on both sides of the line between sections 34 and 35 commencing at the south line of the Steele and Famous Lee forties and running thence north until it intersects the Minocqua-Hazelhurst road.

The court found, among other things, that in 1907 Noble S. Lee orally offered to the plaintiff town board to give or dedicate a sufficient right of way upon his land for a public highway to extend from the south eighth corner between sections 34 and 35 and north along the section line as indicated above; he also offered to clear all brush and other obstructions from the strip of land about one rod wide along said line and level the surface sufficient to make it passable for teams, provided the town would thereupon accept said dedication and assume responsibility of maintaining and improving said strip as a public highway. That the town board orally accepted said property so dedicated, and two or three years later caused a surveyor to set stakes along said section line and contracted and paid for the clearing and widening of the strip about three rods wide throughout the length of said right of way, except that no clearing was made upon the Jossart forty and a strip of only one and one-half rods wide was cleared on the forty opposite in section 34; that a strip one rod wide was cleared by Noble S. Lee in the fall of 1907; that the said road has been continuously used down to the present time by all persons having occasion to travel thereon without objection or hindrance on the part of any landowner until the year 1918.

That in 1918 the defendants, who were then clearing and improving their land, objected to any travel across the alleged highway and proposed to obstruct the same. That a petition was filed with the town board by defendants and others to have said alleged highway discontinued and at the

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same time to have laid out as a highway a strip running from the quarter-post between the two sections west to the said public highway, but no action was taken upon such petition. In 1919 the defendants further obstructed and attempted to prevent travel on the highway.

In 1919 a petition was filed with the town board to lay out a highway upon the strip in question. The statutory proceedings were carried out and an order made laying out such a highway. The defendants opposed said proceedings and employed counsel to take and an appeal was taken to commissioners to review such order. Upon due proceedings the said order was reviewed and reversed.

After such determination by the commissioners the defendants plowed up so much of the roadway in question as was upon their land, planted crops, and obstructed the use thereof.

As conclusions of law the court held that the plaintiff is estopped to now maintain that a highway was ever legally laid out, dedicated, or acquired on the said strip and for that reason plaintiff has no cause of action, and directed judgment in favor of the defendants, with costs. Each party filed respective exceptions to certain of the findings of fact and conclusions of law, the defendants excepting to the portions of the findings relating to the alleged oral offer by Noble S. Lee to the town board to give or dedicate the right of way for a public highway and to that portion reciting that the town board orally accepted said proposition to dedicate.

For the appellant there were briefs signed by *E. D. Minahan* of Rhinelander, attorney, and *John F. Ames* of Minocqua, of counsel, and oral argument by *Mr. Minahan.*

A. J. O'Melia of Rhinelander, for the respondents.

The following opinion was filed April 5, 1921:

ESCHWEILER, J. The statutory proceedings undertaken in 1919 by the town board to have the strip of land in

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question declared to be a public highway has been terminated adversely to plaintiff's contention and it can claim no rights over the land in dispute except and unless there was such an oral dedication thereof by Noble S. Lee in 1907 and an oral acceptance by the town of such a nature as to make it a public highway. The trial court found that there did so come into existence a public highway, but that such a choice of positions was made by the plaintiff in the proceedings of 1919 that thereby an estoppel was created as against the town to now assert such dedication.

The defendants having filed exceptions to the findings of the court as to the alleged oral dedication and acceptance in 1907, that question is before us for review. After a consideration of the evidence we are forced to the conclusion that it is not sufficient to warrant the finding that there was created a public highway by the proceedings of 1907 and subsequently, and having reached such conclusion it is unnecessary to consider the question as to whether or not the town board had estopped itself from asserting rights over the said strip.

No question is raised but that at the time of the alleged dedication, being prior to the amendment to sec. 1294, Stats., by ch. 525, Laws 1913, an oral acceptance by a town board of a dedication of a public highway was lawful and binding.

Noble S. Lee and his sons remained in continuous ownership of all the forties in question on both sides of the alleged highway until 1915, the time of the sale to defendants, except the forty at the southwest end and the forty at the northeast corner of such strip. There is no contradiction of the positive testimony of the owners of these two forties, Steele and Jossart, that neither gave any land to the town of *Minocqua* for such highway purposes. It is undisputed that a portion of the highway as cleared out and used by the Lees was upon the lands owned by Steele and Jossart

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respectively. It is also undisputed that the Lees occasionally reached the main highway by a trail along Steele's south line. The center line as staked out by the town surveyor shortly after 1907 would necessarily place a portion of such highway upon the Steele and Jossart forties.

There is no evidence tending to show that Steele or Jossart were either expressly informed by the Lees or by the town board that there had been any attempt at a dedication or an acceptance of the strip as a public highway either as a whole or as to any part thereof. So far as these two abutting owners were concerned, this strip was but a private right of way existing by their permission over their lands. *Tupper v. Huson,* 46 Wis. 646, 1 N. W. 332. The evidence expressly negatives any intention on their part to dedicate their respective portions of this strip to the public. There is nothing to show an estoppel as to them, nor sufficient evidence to show that there had been such public use thereof as distinguished from its use as a private right of way to make it as to these two a highway by public user, the actual work upon it having been done by those for whose benefit it was first brushed out, namely, the Lee families.

We find nothing in the record which would warrant a finding that there was anything done by the Lees or by the town which would be sufficient notice to either Steele or Jossart that this trail through the woods had been changed from a private right of way into a public highway.

The mere furnishing of funds by the town board for work upon such strip, if such were furnished, could not convert that which was a private easement, so far at least as Steele and Jossart were concerned, into a public one. *State ex rel. Lightfoot v. McCabe,* 74 Wis. 481, 484, 43 N. W. 322; *Cunningham v. Hendricks,* 89 Wis. 632, 636, 62 N. W. 410.

It is manifest that no proper proceedings for the opening of the strip of land in question as a public highway could have been taken under the statute without proper notice and

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participation by Steele and Jossart as well as Lee. There could be no proper statutory public highway along the portion of the section line in controversy here as to the lands of Lee alone, excluding the property of Steele and Jossart. It could not become a public highway by piecemeal so as to be a public highway for the full width over the Lee property, where he owned on both sides of the line and for half of its width and on one side only of the forties opposite Steele and Jossart, respectively. It is equally manifest that it could not have become a public highway by dedication of the owners of but part of the entire strip. And no claim is made by plaintiff that anything less than the whole strip in length and breadth is the public highway over which the plaintiff asserts control.

The alleged dedication, therefore, by Lee, which alone was the one accepted, if any, by the town board, being but of a part of that which necessarily went to make up the alleged public highway, being of no binding force or effect as to the forties of Steele and Jossart, was all futile so far as declaring the entire strip to be a public highway.

It being apparent that there was not in any view of the testimony sufficient oral dedication of the strip in dispute as and for a public highway, the plaintiff is without support for any claim of right over the strip in question, and for that reason the judgment dismissing the complaint was correct.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on May 31, 1921.

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HEDSTROM, Appellant, vs. SCHAUMANN, Respondent.

April 8—May 31, 1921.

Contracts: Consideration: Promise to make payment to third person: Novation: Consent to substitution of debtors: Parol evidence.

1. Plaintiff and defendant, purchasers of land under separate contracts, had both defaulted on their contracts with the vendor after plaintiff had paid $100 and defendant $900, and, plaintiff desiring to get his money back, the vendor agreed by letter that defendant's contract should be extended to allow defendant to make a payment at a future date and that plaintiff's $100 payment should be credited thereon, "for which credit you [defendant] are to make a satisfactory deal with" plaintiff. Defendant did not make the necessary payment to extend his contract, but later, on several occasions, promised to pay plaintiff the $100, and plaintiff looked to him therefor. *Held,* that the consideration for defendant's promise to pay plaintiff the $100 did not fail because defendant did not avail himself of the option, the consideration for the promise being the option acquired by defendant to make a later payment on his contract and to apply plaintiff's payment thereon.
2. The consent of the plaintiff to the substitution of debtors may be shown by parol, notwithstanding the contract between defendant and the vendor was in writing.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action begun in the civil court of Milwaukee county to recover $100 claimed to be due from defendant to plaintiff under the following circumstances: Both plaintiff and defendant had purchased lands in Florida under separate contracts from the Thomas Nurseries, Inc., of Chicago and both were in arrears on their payments and the contracts were defaulted. Plaintiff had paid only $100 on his contract and desired to secure the return of his payment. This the Thomas Nurseries, Inc., refused to do. May 4, 1918, both plaintiff and defendant called at the office of the Thomas

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Nurseries, Inc., at Chicago for the purpose of making some adjustments of their several contracts with the Thomas Nurseries, Inc., and as a result of the conference the following agreement was entered into:

"THE THOMAS NURSERIES, INC.

"Chicago, Illinois, May 4, 1918.

"*Mr. B. Schaumann,* Milwaukee, Wisconsin.

"Dear Sir: Pursuant to our verbal understanding, we agree to extend the time on your contract No. 109D until June 12, 1918. If on or before that date you pay us $50, we will reissue a contract covering a five-acre tract in our Silver Lake Estates project, the exact location of which is to be satisfactory to you. On the issuance of the new contract you are to receive credit for all payments made prior to that date on your old contract and you are also to receive credit, if you so desire, for the $100 paid by *Mr. Hedstrom* on his contract, for which credit you are to make a satisfactory deal with *Mr. Hedstrom.*

"Providing you do not make a payment of $50 on or before June 12, 1918, we will continue the contract for an additional thirty days with the understanding that you are to pay us $350 in cash, and including the $100 paid on the *Hedstrom* contract, on or before June 12th. If your contract is reinstated on the latter basis, the same conditions will prevail as in the case of payment on or before June 12, 1918.

"Yours very truly,

"THE THOMAS NURSERIES, INC.

ICH: GL "By Ira C. Humphrey, Secretary.

"Accepted: *Bruno Schaumann.*"

The defendant did not avail himself of either option mentioned in the agreement and made no further payments on his contract, but he later on several occasions promised to pay plaintiff the $100, and one time, on a Sunday, gave him a promissory note for the amount, and plaintiff looked to defendant and not the Thomas Nurseries, Inc., for the payment of the $100.

The civil court gave judgment for plaintiff, but the circuit court on appeal reversed it on the ground that defendant

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received no consideration for his promise because he never performed the conditions upon which it was made, and entered judgment for defendant. The plaintiff appealed.

For the appellant there was a brief by *Perry & Perry* of Milwaukee, and oral argument by *C. Stanley Perry*.

George A. Affeldt of Milwaukee, for the respondent.

VINJE, J. Whether the acceptance by defendant of the agreement set out in the statement of facts amounted to a contract on his part to carry out one or the other of the alternative offers therein made, which could be enforced by the Thomas Nurseries, Inc., or amounted only to an acceptance of two options either of which he could or need not carry out, he nevertheless received a valuable consideration for his promise to pay the $100 to plaintiff. He had paid $900 on his contract and by its terms it was defaulted. As a consideration for a reinstatement of the contract and an extension of the time of payment he was given the specified options and was to receive credit on his contract for the $100 to be paid to plaintiff. There is no dispute but that if defendant owed plaintiff anything it is the full sum of $100 and interest.

It will be noticed that both options provide for the payment to plaintiff of the $100. The fact that defendant did not see fit to avail himself of the benefits of his contract cannot affect plaintiff's right to recover. He did not, as the circuit court seemed to think, promise to pay it on condition that he availed himself of the contract. The acceptance is absolute. There is no condition expressed and none can be implied. He received a valuable consideration for his promise, to wit, the continuing in force of a defaulted contract and the application of plaintiff's $100 payment on his own contract if carried out. It was relied upon by plaintiff and consented to by the Thomas Nurseries, Inc., and that amounts to a valid novation. *T. W. Stevenson Co.*

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v. Peterson, 163 Wis. 258, 157 N. W. 750. It is true that the consent of plaintiff to the substitution of defendant as his debtor was not embodied in the written agreement, but that may be shown by parol or by circumstances and the conduct of the parties. *T. W. Stevenson Co. v. Peterson, supra.* Here there was no material dispute about the fact that plaintiff accepted defendant as his debtor and released the Thomas Nurseries, Inc. The giving of the promissory note, in defendant's handwriting, though void by reason of its execution on Sunday, shows that such was the understanding. It recites that it was for a land transaction, and the subsequent oral agreements made on secular days to pay this sum in a sense ratify the Sunday note though it is not made the cause of action.

The Thomas Nurseries, Inc., parted with a valuable consideration in reinstating defendant's defaulted contract and giving the options. The defendant received this consideration, and because of it and the credit of $100 he was to receive upon his own contract he agreed to pay plaintiff the $100. As before stated, the fact that he later concluded not to carry out either option did not destroy the consideration he received nor the promise that his acceptance constituted, especially in view of the subsequent conduct of the parties showing a reliance upon the promise on the part of plaintiff and an acknowledgment thereof on the part of defendant.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

ROSENBERRY, ESCHWEILER, and OWEN, JJ., dissent.

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SCHULTEIS, Appellant, vs. MILWAUKEE CONCRETE MIXER COMPANY, Respondent.

May 3—May 31, 1921.

Damages: Loss of services of minor: Excessive damages: Appeal: Setting aside verdict: Error of civil court of Milwaukee county: Reversal by circuit court.

1. The verdict of a jury cannot be set aside if supported by any credible evidence; and a judgment of the civil court of Milwaukee county should not be reversed by the circuit court in the absence of error such as would justify a reversal of the circuit court by the supreme court.
2. In a father's action for the loss of the services of his nineteen-year-old son as a result of personal injuries sustained in an automobile collision, where the boy had no permanent or fixed vocation and no particular trade or occupation, and where the testimony showed that at the time of the trial he could do any work that did not require the use of the right shoulder for extreme lifting or quick motions backward of the shoulder, and the only damages proved at the trial being $18 paid for the hospital bill and the loss of one month's services, which did not exceed $96, a verdict for $1,000 was excessive.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Plaintiff brought this action in the civil court of Milwaukee county to recover damages for the loss of the services of his son, who was about nineteen years of age, as the result of personal injuries sustained in an automobile collision. The case was tried before a jury. A verdict was returned upon which plaintiff was entitled to judgment, and the damages were assessed at $1,000. Upon appeal to the circuit court the judgment was reversed and a new trial in that court was ordered. From such order plaintiff brings this appeal.

Ray J. Cannon of Milwaukee, for the appellant.

Henry J. Bendinger of Milwaukee, for the respondent.

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OWEN, J. It does not appear upon what ground the circuit court reversed the judgment of the civil court, but it was assumed in the argument here that it was on the ground that the damages assessed by the jury were excessive. It is conceded by both parties that the facts upon which liability is predicated were properly jury questions and that the verdict of the jury as to such facts is supported by the evidence. We therefore confine our investigation to the question as to whether the damages assessed by the jury find support in the evidence.

It is well settled in this court that the verdict of a jury cannot be set aside if supported by any credible evidence. A judgment of the civil court of Milwaukee county should not be reversed by the circuit court in the absence of error such as would justify a reversal of the circuit court by the supreme court. *Yahnke v. Lange,* 168 Wis. 512, 170 N. W. 722. The jury assessed plaintiff's damages in the sum of $1,000. The trial court declined to set them aside. Upon appeal the circuit court reversed the judgment and ordered a new trial, as provided by the act establishing the civil court of Milwaukee county (ch. 549, Laws 1909). Appellant alleges such reversal is error. The question, therefore, is whether the amount of damages fixed by the jury is sustained by any credible evidence.

The injury occurred on the 23d day of April, 1920. The trial was had on May 25, 1920. The boy was in the hospital six days. He was first examined by Dr. Muckerheide, who turned him over to Dr. Lilly for treatment in the hospital. Neither of these physicians was called as a witness at the trial. Dr. E. H. Fowle supplied the only medical testimony in the case. He made an examination of the boy just before, and evidently for the purpose of, testifying as to his physical condition. He testified that the collar bone or clavicle had been torn from its attachment to the scapula or the shoulder blade. The ligaments were

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re-attached, but the elevation was about one-half inch above the normal point; that there was no way to cure this defect except to cut the ligaments as they have grown together in this malposition and hold them until they have joined in the proper place. When he has the left arm in certain positions, extreme motions of the shoulder and arm, in which he has a break in the uniformity, he will experience some pressure and some pain, and this condition is permanent as far as he could see. It also appeared that the boy was subject to dizzy spells, after the accident and up to the time of the trial. Dr. Fowle further testified that "as soon as the boy gets over the dizzy spells it would be safe for him to drive a car, and in my opinion I should think he could do light work now, such as taking a job as a clerk; in fact I believe he could do any job that didn't require the use of the right shoulder for extreme lifting or quick motions backwards of the shoulder."

At the time of the accident the boy was working for an electrical concern, earning forty-five cents an hour, and his earnings averaged from $20 to $24 per week, which he turned over to his father. It does not appear how long he had occupied this position with the electric company. Prior to working for the electrical concern he worked for the Atlas bakery in the automobile garage repairing automobiles and driving, too, sometimes. How long he held this position and what his earnings were while so engaged does not appear.

It thus appears that the boy had no permanent or fixed vocation. Like many other boys of his age he was working here and there at whatever he could get to do. This action is brought by the father for the loss of the services of the son, which in this instance means earning capacity. Although Dr. Fowle testified that in his judgment there was a loss of shoulder motion, he also testified that the boy could do any kind of work that did not require the use of the right

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shoulder for extreme lifting or quick motions backward of the shoulder. There was no evidence that this would interfere in any way with the work he was doing for the electrical company, or that it would interfere with the performance of any work which he was likely to undertake. He had no particular trade or occupation and, like many other boys of his age, was no doubt open for any and all kinds of employment. There is no doubt that he could enter many lines of employment to which the maladjustment testified to by Dr. Fowle would interpose no interference.

The only damages proved at the trial were $18 paid by the father for the hospital bill and the loss of one month's services, which did not exceed $96. The only loss proved, therefore, was $116. The verdict rendered for damages in excess of that amount was based on pure speculation and conjecture and finds no support in the testimony. Conceding that the testimony of Dr. Fowle concerning the permanency of the maladjustment and the resulting loss of shoulder motion was sufficient to form a basis for damages in an action brought in behalf of the boy, there is a total lack of testimony showing that his earning power for and during the remaining years of his minority was in any respect impaired, and affords no ground for the assessment of $1,000 damages found to have been sustained by the father as a result of impaired earning power. The circuit court properly reversed the judgment and ordered a new trial, and the order appealed from should be affirmed.

By the Court.—Order affirmed.

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EDWARD E. GILLEN COMPANY, Appellant, vs. CITY OF MILWAUKEE and others, Respondents.

May 3—May 31, 1921.

Municipal corporations: Competitive bidding on contracts: Officers: Competency if interested in contracts: Milwaukee sewerage commission: Rejecting bids: Discretion: Disqualification of members: Extent of financial interest.

1. Requirements in statutes that municipal contracts be let to the lowest bidder are important and are not to be arbitrarily disregarded; but municipal officers have no right to enter into contracts in behalf of the municipality in which they are interested directly or indirectly.
2. A member of the Milwaukee sewerage commission who at the time a contract was awarded by the commission and for some time prior thereto was in the employ of the successful bidder as a superintendent at a salary of $4,500 a year had such an interest in the business and welfare of such bidder as would tend to affect his judgment in determining on the work involved, in determining to let the work by contract, in framing the contract, in passing on the competency and reliability of bidders, and on questions relating to the performance of the work and the compensation to be paid. Sec. 2, ch. 608, Laws 1913, providing that "no commissioner . . . shall be interested directly or indirectly in any contract entered into under the provisions of this act," is but declaratory of the general rule.
3. Under sec. 8, ch. 304, Laws 1917, authorizing the Milwaukee sewerage commission to reject bids and to award contracts to the lowest competent and reliable bidder, or relet the contract when a bidder is incompetent or unreliable, the commission was justified in deciding that the lowest bidder was not a competent bidder and in reletting the contract, where one of its members was in the bidder's employment as superintendent, even though such member resigned his position with the bidder and the work was relet at a higher price. The commission may either accept the bid of the person who in their judgment is the lowest competent and reliable bidder or relet the contract.
4. A member of the sewerage commission who never had any financial interest in a company in which his son was interested and of which the son was an officer, and who ten years before had disposed of all his interest in the company's predecessor. was not disqualified to vote on the award of a contract to such company.

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5. Nor was such commissioner disqualified to vote on the award of a contract to a corporation leasing land from a company of which he was a stockholder where it was not shown that the lessee company was insolvent or had not paid its rent promptly, or that the land would not rent to others for an equal amount, especially where the other members of the commission knew the facts.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Taxpayer's action to enjoin performance of a contract of the Milwaukee sewerage commission for public work alleged to have been made contrary to law. From judgment dismissing the complaint plaintiff appeals.

The sewerage commission of the city of *Milwaukee* is a board operating under ch. 608, Laws 1913, and acts amendatory thereof. In the winter of 1919–1920 it was planning the construction of a part of the sewage disposal plant involving the building of a cofferdam, piling, and excavation. The commission consisted of five members, among whom were *Conrad Niederman,* vice-chairman, who had been a member since its organization in 1913, and William H. Gillen, who became a member in September, 1919. In the early winter there was a vacancy on the commission which was filled on or about January 31, 1920.

Niederman had been a contractor for about thirty years, had been a stockholder and officer of the Starke Dredge & Dock Company, which was engaged in the contracting business. He sold certain of the stock to his older son, and the same was paid for to the satisfaction of the parties. Some ten years ago *Niederman* retired from the business, dividing his remaining stock among his two sons as a gift. He requested that the older son be elected a director of the company and it was done. Some three years later the Starke Company sold out to the *Great Lakes Dredge & Dock Company,* a company engaged in a similar business, payment being made in stock of the latter company. The older son still continues a stockholder and officer of that

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company. The other son sold his interest. *Niederman* himself still remains a stockholder of the D. & D. Land Company, which owned and leased to the Starke Company the yard of the latter. The yard was taken over by the *Great Lakes Company,* which holds under lease from the Land Company. *Niederman* testified that some three years previously he had advised the sewerage commission of this fact; that George P. Miller, the chairman, knew of it.

Gillen for five or six months prior to December, 1919, had been in the employ of the *Edward E. Gillen Company* as a superintendent at a salary of $4,500 per annum. He had been engaged on contracts with private corporations at points outside of Milwaukee, but so far as appears was subject to employment wherever the company desired his services. He is a cousin of the president and principal owner of the *Gillen Company,* but is not himself a stockholder or officer. He testified that when the mayor appointed him on the commission he explained his connection with the *Gillen Company* and asked if it would interfere with his serving, and that the mayor had answered he did not think so, that he would get an opinion on it from the city attorney, and that it was no connection. On several occasions during the consideration of the work contemplated and of the bids submitted therefor members of the commission had asked Gillen if he was connected with the *Gillen Company,* or interested in it directly or indirectly, or if the *Gillen Company* was his company, and he had answered No. He testified that they had never asked him directly if he was employed by the company as superintendent. None of the other members knew of the relationship which he had with the company.

At a meeting of the commission on November 28, 1919, plans for the proposed work as set out in "Notice No. 51" were considered, and the trial court found that Commissioner Gillen participated therein and voted for approval thereof.

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At a meeting on December 18,1919, at which three commissioners, including *Niederman* and Gillen, a bare quorum, were present, bids were received under "Notice No. 51." The two lowest bids were *Edward E. Gillen Company* $336,070 and *Great Lakes Dredge & Dock Company* $393,470. By vote of all three commissioners present the work was awarded to the *Gillen Company* upon their bid. At a meeting on January 8th from which Gillen was absent, the fact of the latter's employment by the *Gillen Company* was discovered by inquiry of the president of the company and execution of the proposed contract was delayed pending a later meeting and the securing of an opinion from the city attorney. On January 26th Gillen resigned his position with the *Gillen Company,* effective January 28th. At a meeting on January 31, 1920, four commissioners, including Gillen and *Niederman,* being present, Gillen having admitted his employment by the *Gillen Company,* the chairman of the commission refused to sign the contract which had been prepared for the work under "Notice No. 51," and by motion his action was confirmed and a readvertisement for bids directed. The motion was adopted by the affirmative vote of Commissioners Miller and *Niederman* against one negative, Commissioner Gillen not voting. At a meeting on February 9th new bids were called for under substantially the same conditions as for contract No. 51, except that the commission undertook to furnish certain steel sheet piling, a patented article. This change was made in order that there might be no further delay in placing an order for the same, and it was purchased by the commission at a cost of $63,747.50. These new proposals were known as "Notice No. 53." At a meeting on February 26th bids were received on "Notice No. 53," the two lowest being *Great Lakes Dredge & Dock Company* $275,930 and *Edward E. Gillen Company* $292,300, the lowest bid being thus $3,607.50 in excess of the *Gillen Company* bid on "Notice No. 51" when

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the price paid for the patented article is added. At said meeting a contract was awarded to the *Great Lakes Dredge & Dock Company* upon its bid by the affirmative votes of *Niederman* and another against the negative vote of Gillen, and thereafter a written contract pursuant thereto was duly executed and work was begun on April 26th. The present action was commenced March 1, 1920. To the time of the trial no funds had been paid under the contract.

The trial court found the above facts substantially as stated. His findings with reference to the interests of Commissioners Gillen and *Niederman* are stated in the course of the opinion. He concluded that the commission acted within its powers in reletting the contract, and that the contract with the *Great Lakes Company* was valid, and dismissed the complaint.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

For the respondent *City of Milwaukee* there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

Robert N. McMynn of Milwaukee, for the respondent *Great Lakes Dredge & Dock Company.*

JONES, J. As their first assignment of error appellant's counsel claim that the court erred in its conclusion of law to the effect that the sewerage commission, under the circumstances, had the power to relet the contract in question. Ch. 304, Laws 1917, relating to sewage disposal works in cities of the first class, which was in force at the time in question, provides as follows:

Sec. 8. "That all work done or supplies or material purchased in carrying out the purpose of this act when involving the expenditures of one thousand dollars or more shall be by contract awarded to the lowest responsible bidder in accordance with the laws of this state and ordinances then

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applicable to any such city having reference to the letting of public work by and through the board or commissioner of public works or other proper department in such city except that said commissioners shall discharge the duties imposed by such laws upon the commissioner or board of public works or other department. . . . Whenever any bidder for any work to be let by the commissioners shall be, in the judgment of said commissioners, incompetent or otherwise unreliable for the performance of the work for which he bids, the said commissioners may accept the bid of the person who in their judgment is the lowest competent and reliable bidder for said work, stating their reasons therefor, or relet the same anew."

Then follow provisions as to the terms of the contract to be made and the mode of its execution.

It is argued that requirements in statutes that contracts be let to the lowest bidder are important and are not to be arbitrarily disregarded. In this proposition we fully concur. But it is also true that officers have no right to enter into contracts in behalf of the municipality in which they are interested directly or indirectly.

The court found, and we think correctly, that William Gillen, while drawing a salary of $4,500 from the *Edward Gillen Company,* had participated in the examination and consideration of the plans of the work and had voted to approve them, and had passed upon the competency and reliability of the bidders. Under the contract contemplated, the commission, four or all members agreeing, would have the power to decide whether any part of the work should be performed by the commission itself. Here there might have been a direct conflict of interest between the company and the municipality. The contract would have provided that the commission might under some circumstances extend the time for the performance of the work, and the contract would have contained provisions for liquidated damages for delay beyond the stipulated time. As employee of the company there was nothing to prevent William Gillen from

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being placed in superintendence of the work. The contract would have provided that the commission might increase or diminish the amount of work to be performed. Under the contract proposed, the chief engineer, with the consent of the commission and under its direction, would be called upon to purchase or hire appliances and secure material for the work in case of the failure of the contractor so to do. There would be many other duties to be performed by the commission, among which may be mentioned the making of payments and taking over the work in case of default by the contractor. In the execution and performance of a contract of this character involving between $300,000 and $400,000 and which might extend through a considerable period of time, it is plain that there would constantly arise conflicts of interest. The records of the courts abound in illustrations of such conflicts. As commissioner, William Gillen's duty would have been to protect the interests of the city with the utmost fidelity. As employee of the company he would have been expected to serve with the same fidelity another master. As a superintendent in the service of the company he was interested in the financial success of its contracts to the end that his service and salary might be continued and possibly that he might be promoted.

A statute which the commission was bound to obey provides: "No commissioner or person holding appointment under said commission shall be interested directly or indirectly in any contract entered into under the provisions of this act." Sec. 2, ch. 608, Laws 1913. But the statute is only declaratory of the general rule which has long prevailed forbidding members of boards and common councils from making contracts with themselves or in which they are interested.

It is true that William Gillen had no stock in the company and was not one of its officers, and in that respect he was not financially interested in the contract. The court found that

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he was not pecuniarily interested in the contract directly or indirectly, but the trial judge also found that from the time of the examination of the plans and the vote for their approval up to the time of his resignation he "had such an interest in the business and welfare of the said *Edward E. Gillen Company* as would naturally tend to affect his judgment in determining upon the work involved in said official notice No. 51, in determining to let that work by contract pursuant to said notice, in framing that contract, in passing upon the competency and reliability of bidders, and upon questions relating to the performance of that work and the compensation to be paid therefor to the contractor."

We are satisfied that his finding is correct. The question then arises whether under the circumstances the commission was bound to sign and carry out a contract with the *Gillen Company*. Another part of the section of the statute already quoted is as follows:

". . . and provided, however, also that said commission with the consent of four or all its members may itself do any part or parts of any such work under such conditions in every respect as it may prescribe by day labor, whenever the chief engineer, in writing shall recommend that course; any and all bids or parts of bids for any such work or supplies or materials may be rejected by said commission." Sec. 8, ch. 304, Laws 1917.

This language was contained in sec. 8, ch. 608, Laws 1913, as well as in the amendatory act of 1917 already quoted.

It was argued by appellant's counsel that this language of the statute did not give to the commission the power, in its discretion, to reject bids for work, supplies, or material, but that under the rule laid down in the case of *Neacy v. Milwaukee,* 171 Wis. 311, 176 N. W. 871, all bids could be rejected only in the event that they were regarded in good faith as unreasonably high. An entirely different statute relating to the action of the commissioner of public works

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was construed in that case, and the powers given to the sewerage commission are so different that the decision does not seem to control the present case.

It was argued by counsel for the respondents that the statutes above quoted gave to the commission wide discretion to reject bids without regard to the competency or reliability of bidders. In view of the conclusion to which we have come it seems unnecessary to decide the question thus raised. Whatever discretionary powers the commission may have had prior to the amendment of 1917 first quoted above, we are convinced that under the plain language of the statute existing when these transactions took place they had the power, if in their judgment a bidder was incompetent or unreliable for the performance of the work, to do either one of two things: they could accept the bid of the person who in their judgment was the lowest competent and reliable bidder, stating their reasons therefor, or, in the language of the statute, they could relet the same anew.

When its bid was made the *Gillen Company* doubtless knew that one of its salaried superintendents was one of the commissioners. William Gillen was repeatedly asked by members of the commission whether he was interested directly or indirectly in the *Gillen Company* and always replied in the negative. There was also testimony to the effect that he stated to them that he was not in the employ of the *Gillen Company*. George P. Miller was chairman of the commission and thoroughly understood the duties of municipal officers and the evils which arise when their duties to the public and their private interests conflict. At his direction inquiry was made of an officer of the *Gillen Company* and the real facts were ascertained.

With these facts before them the commission evidently believed that William Gillen was indirectly interested in the proposed contract and that the interests of the city demanded the rejection of the bid. It is our view that this action

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should be commended and sustained. It is also our belief that if other public officers under similar circumstances used the same precautions and firmness the public interests would often be better subserved.

The word "indirectly" in the statute is not without meaning. If William Gillen had been a stockholder in the company there would have been such direct financial interest in the contract under the rule declared in many decisions as would come clearly within the prohibition of the statute. With a salary of $4,500 per year, his interest in the success of the company may have been much greater than if he had owned a small amount of stock.

It is argued by counsel for appellant that no injury would have been suffered by the city; that on the contrary there would have been a gain to the city of $3,607.50 if the *Gillen Company* bid had not been rejected. This is by no means certain. There were many ways in which much heavier losses to the city than this amount might be incurred in the performance of such a contract if a commissioner were more zealous to protect private than public interests. Moreover, actual loss to the public is not the principle on which the law proceeds in condemning transactions of this kind. The law seeks to avoid situations where public officers are tempted to sacrifice the interests of the public to their own, which destroy faithfulness and fidelity in public service.

There are many decisions holding that contracts are invalid when made by a municipality or a board with a corporation having a stockholder who is also a member of the board or common council. In that case the public officer has a direct proprietary interest in the corporation. But we find very little authority on the exact question here involved, that is, whether contracts with a municipality made between a corporation having a salaried manager or employee who is also an officer of the city or board, are valid. We do not hold that under all circumstances a contract between a

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municipality and a corporation having an employee who is also a public officer of the municipality would be invalid. The compensation of the employee might be so slight or his employment so transient that there would arise no conflict of interest. We do hold that under the facts proven in this case the commission and the trial court were justified in deciding that the *Gillen Company* was not a competent bidder.

It is claimed that at least after the resignation of William Gillen as a superintendent of the *Edward Gillen Company* the board could properly sign and execute the contract. But after he had participated in the proceedings as above stated the resignation came too late. If contracts could be thus made and consummated by public officers holding interests adverse to the public after participating in the preliminary proceedings, the statute would be shorn of its usefulness. The taint cannot be so easily removed.

The second and third assignments of error are in substance that the court erred in holding that *Conrad Niederman* was qualified to vote on the award of the contract to the *Great Lakes Company* and in holding that the contract was valid. *Mr. Niederman* never had any financial interest whatever in this company. Ten years before, he had disposed of all his interest in its predecessor. The trial court found that he had "never been a stockholder or officer of said *Great Lakes Dredge & Dock Company,* and has never been directly or indirectly pecuniarily interested in said corporation." It is true that he had a son who was directly interested in the company and one of its officers.

The decisions are to the effect that contracts may be legally made by a municipality although a relative of the bidder is one of the governing board or council. In such a case there is no direct or indirect interest in the contract. *Lewick v. Glazier,* 116 Mich. 493, 500, 501, 74 N. W. 717; *Cason v. Lebanon,* 153 Ind. 567, 55 N. E. 768.

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Mr. Niederman was a stockholder in a company which leased some land to the *Great Lakes Company*. There is no proof that the company is not solvent, that it has not paid its rent promptly, or that the land would not rent for an equal amount to another customer. *Niederman* frankly told the facts to the commission. The commissioners evidently believed that he had no such connection with the *Dredge Company* as would influence his conduct or tend to prevent him from faithfully serving the public. We find no error in the conclusion of the circuit court that the contract was properly let to the *Great Lakes Dredge & Dock Company*.

Respondents urged that appellant had waived its right to maintain this action by laches, and also by bringing an action on February 18, 1920, against the city of *Milwaukee* for $60,000 damages alleged to have been suffered by its refusal to execute and carry out the contract with the plaintiff. It is unnecessary to decide these questions.

By the Court.—Judgment affirmed.

OWEN, J., dissents.

GRAHAM, Appellant, vs. LAMP, Respondent.

May 4—May 31, 1921.

Real-estate brokers: Contract of employment: Sufficiency: Description of land: Parol evidence: Duration of contract: Mutuality and consideration: Signature of owner.

1. A brokerage contract containing a certain house number at the beginning of the contract and also on the back, authorizing the broker to sell the buildings "on this lot," is a sufficient description under sec. 2305*m*, Stats., requiring such a contract to describe the real estate to be sold, in view of parol testimony that the words "this lot" were intended to refer to the address at the beginning of the contract.
2. Parol or extrinsic evidence is admissible to identify land to be sold under a brokerage contract. *Gifford v. Straub*, 172 Wis. 396, followed.

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3. A brokerage contract which was to remain in force until a specified date, and thereafter until terminated by the owner giving to the broker thirty days' notice in writing, is not void for indefiniteness as to duration, in violation of said sec. 2305*m*. *Brown v. Marty*, 172 Wis. 411, followed.
4. A contract by which the owner of real property agrees to give a broker the exclusive right of sale and to pay a commission, "in consideration of your agreement to list and your efforts to find a purchaser," is not void for lack of mutuality, there being a promise for a promise; and even if such promise were not expressed the contract will not be held void for want of mutuality or for lack of consideration after the broker has made a *bona fide* effort to sell the land.
5. Where the daughter of the owner signed his name to the brokerage contract in the presence of the owner and at his direction, the signature was binding on the owner.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action begun in the civil court of Milwaukee county to recover commission for the sale of real estate under the following written contract:

"Owner John Lamp.
"Listed by ——,
"Address 1211 20th St.
"*H. R. Graham,* Milwaukee, Wis., June 11, 1919.
"30–34 Patton Bldg., cor. Grand Ave. at 5th street.

"In consideration of your agreement to list and to use your efforts to find a purchaser for the herewith described property, the undersigned hereby grants and gives you the exclusive right to sell:

"2 Cottages on this lot 49 x 126 ft.

"5 R. Cottage Front Cottage; 5 R. Rear Cottage, net $4,500.

"For the sum of $4,800. . . .

"This contract to remain in force until the 31st day of December, 1919, and thereafter until terminated by the undersigned giving a thirty days' notice in writing.

"The sale agency is herewith accepted
"By H. R. GRAHAM,
"Member of Milw. Real Estate Assn.
"Mrs. F. LAMP. (Seal)"

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The back of the contract contained the following: "Location, 1211 20th St. Size of lot, 49 x 126."

The defense was that the contract did not comply with sec. 2305*m*, Stats., in that (a) it did not sufficiently describe the real estate to be sold; (b) it did not provide a definite time for the expiration of the contract; (c) it lacked mutuality; and (d) it was not signed by the defendant.

The civil court found that the contract was sufficient and gave judgment for plaintiff. Upon appeal to the circuit court the judgment of the civil court was reversed, and judgment entered for defendant on the ground that the written contract did not sufficiently describe the real estate to be sold. The plaintiff appealed.

John A. McCormick of Milwaukee, for the appellant.

For the respondent the cause was submitted on the brief of *Albert H. Riemer,* attorney, and *Adolph Huebschmann,* of counsel, both of Milwaukee.

VINJE, J. The circuit court disposed of the case on the ground that the contract failed to comply with sec. 2305*m,* Stats., in that it did not describe the real estate to be sold. Such statute requires every contract to pay commission for the sale of real estate to be in writing, and among other things to describe the real estate to be sold. The description in the body of the contract was as follows: "2 Cottages on this lot 49 x 126 ft. 5 R. Cottage Front Cottage; 5 R. Rear Cottage." The contract begins: "Owner John Lamp. Listed by ——. Address 1211 20th St. Milwaukee, Wis., June 11, 1919;" and on the back of the contract the following appeared: "Location, 1211 20th St. Size of lot, 49 x 126."

The civil court was of the opinion that the words "this lot" in the body of the contract referred to the number, 1211 20th St., at the beginning of the contract, and that this made the description definite enough. That such description was the one intended was shown by parol testimony. In *Gifford v. Straub,* 172 Wis. 396, 179 N. W. 600, the

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description was "My place," and it was held to be sufficient where parol testimony made it definite and certain. It was there said: "The writing relied on to establish the contract need not describe the land which is subject to sale otherwise than by a reference therein to some extrinsic fact by means of which the land can be known with sufficient certainty;" citing a large number of cases. In *Brown v. Marty,* 172 Wis. 411, 179 N. W. 602, the description was, "Property owned by the first party described as follows: 200 acres in Sections 35 and 36, Town of Springdale, Dane Co., Wis.," and it was held to be sufficient for the reasons stated in *Gifford v. Straub,* 172 Wis. 396, 179 N. W. 600. The description here is more definite than those in the cases mentioned, and the civil court correctly held that the address 1211 20th St., together with the words "this lot" in the body of the contract, together with the parol evidence, described the property with sufficient certainty.

That parol or extrinsic evidence to identify the land is admissible is well established. *Gifford v. Straub, supra,* and cases cited.

It is next argued that the contract is void because its duration is not fixed with such definiteness as sec. 2305*m* requires, in that it is not to be terminated till the owner gives thirty days' written notice. This contention was ruled adversely to respondent in *Brown v. Marty,* 172 Wis. 411, 179 N. W. 602, where it was held that a contract providing a method by which the duration can be definitely fixed complies with the statute. This contract does so, namely, thirty days after written notice of termination is served.

The claim that the contract lacks mutuality has no basis in fact. It says: "In consideration of your agreement to list and your efforts to find a purchaser," the owner agrees to give exclusive right of sale and to pay commission. We have here promise for promise. But even if we did not have such promise expressed it would not be void for want of

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mutuality or for lack of a consideration where the broker makes a *bona fide* effort to sell. *Greene v. Minn B. Co.* 170 Wis. 597, 176 N. W. 239.

It appears that the defendant did not sign the contract personally but directed her daughter to sign her name for her, which was done in her presence. This made a signature binding upon defendant.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

PISARKE, by guardian *ad litem,* Respondent, vs. WISCONSIN TUNNEL & CONSTRUCTION COMPANY, Appellant.

May 4—May 31, 1921.

Negligence: Steam emitted into street: Automobiles: Injury to pedestrian: Concurring negligence.

1. In an action for damages suffered by a pedestrian struck by an automobile whose driver was in a cloud of steam and vapor emitted into the highway from the defendant's engine, which was lawfully engaged in work in the street, it is *held* that the jury, in finding that the defendant was negligent in permitting the steam to escape into the street, found negligence in the manner in which the plant was arranged and constructed as alleged in the complaint.
2. Where the steam in the street made travel on the public highway dangerous, the negligence of one who drove an automobile through the steam to plaintiff's injury and the negligence of the construction company concurred in causing the injuries complained of; and the act of the automobile driver was not an intervening cause breaking the causal connection between the act of the defendant and the injuries to plaintiff.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Personal injuries. The complaint alleges that the defendant had erected and was maintaining on the southeast

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corner of Greenbush street and Chicago road a construction house containing a boiler and steam engine and other machinery; that said house had been so negligently and carelessly erected that the steam and clouds of vapor issuing therefrom were caused to pass and were shot across the public highway at that point; that the steam and clouds of vapor obstructed the view on said highway and rendered the same extremely dangerous to pedestrians, passengers, and drivers of vehicles, and all persons using the highway; that at the time of the accident one Labinski was operating an automobile upon the highway in a negligent and careless manner and ran into the cloud of steam and vapor emitted from the construction house, and struck the plaintiff, knocking him down and injuring him; that the negligence of the defendant was the proximate cause of the plaintiff's injuries.

The answer denied negligence on the part of the defendant and alleged contributory negligence on the part of the plaintiff. The case was begun and tried in the civil court of Milwaukee county. The issues were submitted to a jury by special verdict. The jury found as follows:

(1) That there was an unusual volume of steam emitted into the street from defendant's engine or apparatus at and just prior to the plaintiff's injury.

(2) The defendant failed to exercise ordinary care in permitting the steam to be so emitted into the street.

(3) Such failure to exercise ordinary care on the part of the defendant was the proximate cause of the plaintiff's injury.

(4) The driver of the automobile that struck the plaintiff was prevented from seeing the plaintiff in time to avoid the collision, by the steam discharged from the defendant's engine or apparatus.

(5) The driver of the automobile struck the plaintiff by reason of the fact that he was prevented from seeing plaintiff in time to have avoided the collision, by the steam emitted from the defendant's engine or apparatus.

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(6) The plaintiff was guilty of no want of ordinary care which proximately contributed to produce his injury.

(7) Plaintiff's damages are assessed at the sum of $750.

After verdict there were the usual motions. The defendant's motions were denied, and plaintiff had judgment upon the verdict as rendered. The defendant company appealed to the circuit court and that court affirmed the judgment of the civil court. The defendant appeals from the judgment of the circuit court.

For the appellant there was a brief by *Kaumheimer & Kenney* of Milwaukee, and oral argument by *R. I. Kenney.*

For the respondent the cause was submitted on the brief of *Robert A. Hess* of Milwaukee.

ROSENBERRY, J. The main contention made here is that the defendant company was not guilty of negligence.

The verdict of the jury with respect to negligence is as follows: That there was an unusual volume of steam emitted into the street from the defendant's engine or apparatus at the time or just prior to the plaintiff's injuries, and that the defendant failed to exercise ordinary care in permitting the steam to be so emitted into the street. It appeared without dispute that the defendant company was engaged in the doing of public work and that the engine was lawfully in the place where it was situated. The contention of defendant is that there was no evidence which shows that the engine, being lawfully in the street, was operated in an unusual or negligent manner, and that the finding of the jury in that respect cannot be sustained and is without credible evidence to support it. It appears from the evidence that the steam was emitted from the engine which was used to operate a hoisting device by means of an exhaust pipe which extended on the west side of the construction house horizontally about one foot above the ground and into the portion of the street used for traffic. The unoccupied portion of the

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street was from eight to ten feet on the west side of Greenbush street, which extends north and south. An elbow might have been placed upon the exhaust pipe which would have caused the steam to be emitted perpendicularly.

It is contended by the defendant that the jury did not find that the negligence of the defendant consisted in the manner in which the plant was arranged and constructed, but rather in the manner in which it was used, there being no evidence that it was used or operated in a negligent manner; that the evidence does not support the verdict. The negligence alleged in the complaint is as to the manner of construction and arrangement, and when the jury therefore found that the defendant was negligent in permitting the steam to be so emitted into the street, it found a fact which related to the arrangement and construction of the plant as alleged in the complaint.

It is further contended that the act of Labinski in operating his automobile upon the highway under the circumstances was an intervening cause and broke the causal connection between the defendant's act and the injuries sustained by the plaintiff. It being established that the defendant was guilty of negligence in operating the plant in the manner in which it was constructed so as to make travel upon the public highway dangerous, the negligence of Labinski, if any, and that of the defendant company concurred in causing the injuries complained of. We think the questions as to the contributory negligence of the plaintiff and the proximate cause of plaintiff's injuries were properly for the jury and their determination is conclusive.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). While the complaint alleged, among other things, negligence and carelessness in the erection of the boiler house, yet the only question submitted to the jury as to defendant's negligence was the

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first, namely, "Was there an unusual volume of steam emitted into the street from defendant's engine or apparatus at and just prior to the plaintiff's injury?" The jury answered this "Yes," and the defendant contends, and I think correctly, that the evidence did not support an affirmative finding of the jury to the question as so framed.

The judgment in favor of plaintiff is now being supported on the theory that there was a negligent construction and method of operation of the boiler from which the cloud of steam came at the time of plaintiff's injury. This appears to be a substantially different question from the one answered by the jury. The unusual volume of steam referred to in the first question in the special verdict evidently intended to cover some negligence in the immediate operation of the plant at the time of the injury and not a continuing defect in construction. The question, therefore, upon which the judgment is now predicated by the majority opinion is not the one upon which the defendant was adjudged negligent by the jury. For that reason I think there should have been a new trial rather than an affirmance of the judgment.

HAHN, Respondent, vs. ROTHSTEIN and wife, Appellants.

May 4—May 31, 1921.

Master and servant: Laundress injured by washing machine: Safe-place-to-work statutes: Liability of master and mistress: Damages: Evidence.

1. In an action against husband and wife by plaintiff, who had been hired to do the family washing, for injuries to her hand by being caught in the wringer of an electric washing machine, evidence that a safety device was installed on the machine similar to that on many other types of such machines and that the form of guard suggested by plaintiff's expert witness had been discarded by practically all manufacturers for the one installed, which seemed more adequate for the

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purpose, did not justify a finding of the jury that the wringer, in the usual and customary manner of using it, was not as free from danger as the nature of the work reasonably permitted. The decisions, such as *Van de Zande v. C. & N. W. R. Co.* 168 Wis. 628, indicating the absolute nature of the safe-place-to-work statute (sec. 2394—48), are not minimized but are held inapplicable.

2. Where the defendant wife testified, "We bought the machine," and that she supposed she hired the plaintiff on behalf of her husband as well as herself, judgment was properly rendered against both, in the absence of any testimony to the contrary from defendants.

3. Where the physicians who treated plaintiff were not called to testify and there was not sufficient proof that the erysipelas from which she suffered some time after the injury was a result thereof, this element of damages should not have been considered by the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The plaintiff was hired by *Mrs. Rothstein* to do the family washing at the home of the defendants, husband and wife. They had a Thor electric washing machine, as a part of which and above the portion used for the washing was a wringer attachment. This contained two hard rubber rollers through which the clothes were passed. On one side of the wringer attachment was the electric button by which the power was turned on or off. On the same side was a lever by which the movement of the rollers could be changed from one direction to the opposite. The plaintiff, while standing at the lever side of the machine and with her left hand putting the clothes into the wringer, found it necessary to lean forward over the machine and remove with her right hand some of the clothes which had passed through the wringer and which were piling up on the top or table of the washing machine. She testified that while so doing the machine made a sort of a jerking motion and her left hand was caught between the rollers and forced in almost to the wrist, causing severe injury to the hand and fingers.

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The plaintiff had used other types of electric washing machines somewhat similar to this one.

Liability was predicated upon alleged violation by defendants of the duty imposed upon employers by sec. 2394—48, Stats., requiring that they "shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe."

When plaintiff rested after presenting her case she had offered no testimony as to the possibility of there being any system of guard or guards on such wringer attachment that would minimize or prevent the danger of the operator's hand getting into the space between the rollers. Defendants offered evidence tending to show that it was a practical impossibility with such a shaft-driven machine in the condition that it then appeared to be, to have any jerking motion in its operation. After defendants had moved for a directed verdict plaintiff obtained leave to reopen the case and offered further testimony.

The plaintiff then gave the evidence of an electrician who was familiar with the different kinds of washing machines and wringers on the market. He testified that a defective gear might cause a momentary jerking of the rollers. That on this particular machine there was a safety clutch right above the rollers, the lifting of which released the spring holding the rollers closely together, thereby spreading them apart and stopping the machine. Upon inquiry in that regard he testified:

"It is possible to have a guard on there. It can be put on there for a safety device. If that guard is put on it prevents partly getting your hands in there if anything goes wrong and you kind of get excited. It won't give you a chance to pull in there. . . . You won't get a chance to get up against the rollers."

On cross-examination he testified that in the six different

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types of such machines sold by the firm with which he was then employed there were no guards such as he described on any of them except one which was driven by belt instead of shaft. That as to shaft-driven machines he has not recently seen any that had such a guard. That from seeing approximately ten or eleven different types of electric wringer attachments in the last two years and a half he has not seen any guard that makes such an injury absolutely impossible. No further testimony was offered by plaintiff with reference to the form, manner of attachment, or method of operation of any such possible guard or safety device referred to by this witness.

Defendants' testimony was that some three or four years prior to the time in question the earlier make of this machine did have a guard in front of the wringer, with a slide to feed the clothes through, that was discarded for the present safety device as found on this particular machine, the witness testifying that there is not half the danger with such safety clutch on top as with the older form; that nine tenths of the machines on the market are using the present form of safety device, and only one washing machine was known to witness that had anything similar to the old form of two wood rollers in front of the wringer.

Under the special verdict the jury found as follows: (1) The wringer in question, in the usual and customary manner of using it, was not as free from danger to plaintiff as the nature of the work reasonably permitted; (2) that such failure was the proximate cause of the injury; (3) there was no want of ordinary care on the part of plaintiff proximately contributing to her injury; (4) her damages assessed at $1,800.

Judgment in the civil court of Milwaukee county was ordered in favor of the plaintiff. Upon such judgment defendants appealed to the circuit court, where such judg-

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ment was affirmed. From the judgment of the circuit court defendants have appealed.

For the appellants there was a brief by *Hugo J. Trost,* and oral argument by *Horace B. Walmsley,* both of Milwaukee.

Ray J. Cannon, attorney, and *A. W. Richter,* of counsel, both of Milwaukee, for the respondent.

ESCHWEILER, J. We think the trial court should have set aside the answer of the jury to the first question of the special verdict whereby they found that the wringer in question, in the usual and customary manner of using it, was not as free from danger to the plaintiff as the nature of the work reasonably permitted.

In this instance it appears that a safety device was installed by the manufacturer on this machine similar to that on many other types of such machines being manufactured and sold in the general market. It thus appears that there had been no failure by the manufacturer to attempt, in a measure at least, to meet the requirements of the statute here involved.

It appears without contradiction that the form of guard vaguely suggested by plaintiff's expert witness had been discarded by practically all of the manufacturers of such machines for the one installed and which seemed more reasonably adequate for this very purpose. While this alone is not sufficient as a matter of law to establish that defendant in purchasing and using a machine so equipped has thereby complied with the duty imposed upon him as an employer, yet it is very persuasive in this case in compelling us to arrive at the conclusion at which we do, namely, that the testimony in this particular case was not sufficient to warrant that finding by the jury and without which the judgment in plaintiff's favor could not be supported. For this

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reason the defendants' motion to set aside the verdict and for a new trial should have been granted.

In reaching this conclusion we have not overlooked nor are we unmindful of the many decisions stating the absolute nature of such a statutory obligation as indicated in such cases as *Van de Zande v. C. & N. W. R. Co.* 168 Wis. 628, 630, 170 N. W. 259, and cases there cited, and which are relied upon by respondent in support of the judgment herein. We are not hereby minimizing anything that is held in those cases, but are satisfied that the facts and circumstances in this case do not present a situation that is controlled by the former decisions upon the same statute upholding the rights of an employee to recover as against the employer.

Appellants also contend that in no event could judgment be properly rendered against the defendant husband. The defendant wife testified: "We bought the machine." She also said she supposed she hired the plaintiff on behalf of her husband as well as herself. In the absence of any testimony from the defendants in this regard, the defendant husband has no proper objection on that score.

Appellants also urge as prejudicial error the admission of certain testimony and of a remark by plaintiff's counsel to the jury during the argument. Neither of such, if error, was substantial or prejudicial.

Appellants also challenge the assessment of damages as excessive. The physicians who treated plaintiff for her injury were not called to testify, and under the evidence before us we cannot find sufficient proof of the necessary fact that the erysipelas from which plaintiff suffered some weeks after the injury and after she had returned to work was a result of the injury, and that element of damages should not have been considered by the jury upon the evidence then before them.

The question of plaintiff's contributory negligence, if

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any, was for the jury and could not be decided as a question of law in defendants' favor, as they have asked here.

For the reasons above stated it follows that the judgment must be reversed and a new trial granted.

By the Court.—Judgment reversed, and the cause remanded for a new trial in the circuit court.

NICKAS, Appellant, vs. HINES, Director General of Railroads, Respondent.

May 4—May 31, 1921.

Master and servant: Federal employers' liability act: Assumption of risk: Promise of employer to remedy defective machinery: Simple-tool doctrine.

1. Where work is attended by open and obvious dangers, a servant who undertakes such work appreciating the danger, or continues therein without protest, assumes the risk; but where the risk arises from the use of defective machinery and the employee objects to a continuance of the employment because of the risk arising from such defect and the employer promises to remedy it, the employee may continue in such employment for a reasonable time, relying on the promise to repair, without assuming the risk.
2. Where plaintiff, a railroad section hand, claiming damages under the federal employers' liability act for injuries occasioned by a dull pick, protested to his foreman that the tools were not very good and asked for good picks for pulling ties, and the foreman replied that better picks were not to be had until the arrival of the supply car which was not due for twenty-five days, and that until then the crew had to continue work with the defective picks, plaintiff, by continuing in his employment, assumed the risk, since his protest did not convey to the foreman the impression that he was objecting to the use of the pick because of danger, and since the foreman by such statement did not promise to supply a better pick, in view of plaintiff's knowledge as to when the supply car was due.
[3. Whether this court or the federal courts have taken any position in reference to the so-called simple-tool doctrine, is not involved or decided in this case.]

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APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

On the 1st day of November, 1919, the plaintiff was in the employ of the Chicago & Northwestern Railway Company, as a section hand, at Kimberly, Wisconsin. A portion of his work consisted in removing old ties and substituting new ones in the roadbed. To move the ties it was customary to drive a pick into them and then pull on the handle of the pick. While plaintiff was pulling one of the ties the hold of the pick in the tie gave way and plaintiff fell backwards and sustained personal injuries. He brought this action in the civil court of Milwaukee county to recover damages, basing the same on the so-called federal employers' liability statute. The jury returned a verdict entitling plaintiff to recover. The court, however, rendered judgment in favor of the defendant notwithstanding the verdict, for reasons which will be referred to in the opinion. The plaintiff appealed to the circuit court, where the judgment of the civil court was affirmed, and from such judgment of the circuit court plaintiff brings this appeal.

Ray J. Cannon and *A. W. Richter,* both of Milwaukee, for the appellant.

R. N. Van Doren of Milwaukee, for the respondent.

OWEN, J. The civil court rendered judgment in favor of the defendant, notwithstanding the verdict, on the ground that the undisputed evidence showed that plaintiff had assumed the risk, which is held to constitute a defense under the federal employers' liability act. Plaintiff grounds his action on the proposition that the pick with which he was supplied was so dull that it was impossible to sink it sufficiently deep into a tie to obtain a secure hold thereon; that because of its dullness it constituted an unsafe tool with which to work; that he protested to the section foreman, who promised to supply him with a better pick; that relying

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upon such promise he continued in the work, and because of such protest on his part, and promise on the part of the foreman, he did not assume the risk.

It is elementary that where the prosecution of certain work is attended by open and obvious dangers, a servant who undertakes such work appreciating the danger thereof, or continuing therein without protest, assumes such risk or hazard. Where such risk, however, arises from the use of defective machinery, and the employee objects to a continuance of the employment because of the risk arising from such defect, and the employer promises to remedy it, the law is settled that the employee may continue in such employment for a reasonable length of time, relying upon such promise to repair, without, during such reasonable time, assuming the risk arising from such defect. Plaintiff claims that this case, under the facts and circumstances disclosed by the evidence, is ruled in his favor by the application of such principle. The civil court held that the principle above stated has no application to defective tools or simple machinery. It was so ruled in *Marsh v. Chickering,* 101 N. Y. 396, 5 N. E. 56, and has been adopted by many courts. Following are a few of the numerous cases cited by appellant which have adopted the so-called simple-tool doctrine of *Marsh v. Chickering: Kistner v. American Steel Foundries,* 233 Ill. 35, 84 N. E. 44; *Meador v. L. S. & M. S. R. Co.* 138 Ind. 290, 37 N. E. 721; *Rahm v. C., R. I. & P. R. Co.* 129 Mo. App. 679, 108 S. W. 570; *Brewer v. Tenn. C., I. & R. Co.* 97 Tenn. 615, 37 S. W. 549; *Conley v. American Exp. Co.* 87 Me. 352, 32 Atl. 965; *St. Louis, A. & T. R. Co. v. Kelton,* 55 Ark. 483, 18 S. W. 933; *Gulf, C. & S. F. R. Co. v. Brentford,* 79 Tex. 619, 15 S. W. 561. It is also claimed by appellant that this rule has been recognized and adopted in this state in the cases of *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191, 51 N. W. 328, and *McGinn v. French,* 107 Wis. 54, 82 N. W. 724. The

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soundness of the rule announced in *Marsh v. Chickering* is vigorously assailed by respondent, who contends that it was repudiated by this court in the case of *Williams v. Kimberly & Clark Co.* 131 Wis. 303, 111 N. W. 481. In view of the fact, as we hope presently to show, that this case is resolved against plaintiff upon more fundamental considerations, we find it unnecessary to consider the soundness of the so-called simple-tool doctrine as promulgated in *Marsh v. Chickering,* or whether this court has taken any position with reference thereto, or whether the doctrine has been adopted by the federal courts.

The plaintiff in this case assumed such danger as was incident to the use of the dull pick furnished him unless he protested against using the pick because of the danger connected with its use and unless the section foreman promised to supply him with another pick. Upon this point plaintiff testified that on the day before the accident occurred he told the foreman that "the tools we had got weren't very good. He always used to give us the worst tools we had in the tool house. I told him to give us good tools to work with, to give us good picks, because we were pulling the ties; that is why I asked for good picks. He says we ain't got better picks. We had to continue to work and be careful until the supply car comes and we got new ones. That is all I said and all the foreman said." He further testified that he knew the supply car would not come until the 25th of the month. In order to relieve the employee of the assumption of risk under such circumstances two things are necessary: first, the employee must make it plain to the employer that he declines longer to continue in the employment because of the danger attending the use of such defective tools, appliances, or machinery; second, the employer, realizing such mental state on the part of the employee, must promise to remove the dangerous defect. In reliance upon such promise the employee may continue

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in the employment for a reasonable length of time, which means a time reasonably adequate to permit the employer to remedy the defect, and during such time the employer and not the employee assumes the risk. As said in *Yerkes v. N. P. R. Co.* 112 Wis. 184 (88 N. W. 33), at p. 189:

"The master must be given to understand that the servant protests and objects against continued exposure to the danger. If, so understanding, he promises to remove it, the servant is justified in temporarily continuing the employment until such reasonable time has elapsed as to destroy his right to rely upon the promise to repair, except in certain cases of peculiarly great, imminent, and unavoidable danger. . . . The master meanwhile is responsible for such injuries as are proximately caused by the defect, without contributory negligence."

In the first place, we think the protest made by the plaintiff to the foreman, as testified to by the plaintiff, is utterly inadequate to convey to the foreman the impression that the plaintiff was objecting to the use of the dull pick because of danger resulting from its use. It was such a complaint as a workman might make if furnished with a dull ax or a rusty hoe, and it was made for the purpose of expressing dissatisfaction, rather than fear of danger resulting from its use. In the next place, the evidence likewise fails to show any promise to supply a better or sharper pick. In fact plaintiff's own testimony as to the reply made by the foreman negatives rather than affirms a promise. His own testimony is to the effect that the foreman told him that new picks could not be secured until the supply car came, and that he, plaintiff, knew that would not be until the 25th of the month. Thus the foreman in effect said to him: You will have to work with this pick until the 25th of this month. You cannot have a new or better pick until that time. This constituted no promise to remove the danger, if danger there was, within a reasonable length of time, but constituted definite information to the plaintiff

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that he would have to submit to the risk attending the use of the dull pick for a period of twenty-five days. Knowing this, the plaintiff voluntarily continued in the employment and thereby assumed the risk. Upon these grounds, if not upon the ground assigned by the trial court, judgment was properly rendered in favor of the defendant notwithstanding the verdict of the jury.

By the Court.—Judgment affirmed.

HOLLAN, Appellant, vs. CITY OF MILWAUKEE, Respondent.

May 4—May 31, 1921.

Municipal corporations: Defective sidewalks: Test: Slope of walk to crossing: Slight imperfections.

1. The rule that the topography of the locality, development of the community, standard of road construction, amount and character of traffic, etc., are to be considered in determining whether a given condition renders a highway defective, applies to sidewalks in cities as well as to country highways.
2. A slope of seven inches in a cement sidewalk approaching the flagstone portion of the walk at a crossing where plaintiff slipped and was injured did not constitute a defect rendering a city liable for plaintiff's injuries.
3. Sidewalks and crosswalks maintained by a city are not required to be perfect, it being sufficient that they are reasonably safe. There may be inequalities, projections, and depressions so slight that city authorities may assume they will not cause injury to persons using ordinary care; and it is *held* in this case that a projection of one cobblestone one and one-eighth to two inches over the others in a walk across an alley belonged to that class.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action for damages for personal injuries. Trial before a jury in the civil court of Milwaukee county resulted in judgment for plaintiff upon a special verdict. On appeal

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to the circuit court judgment was reversed, and judgment entered dismissing the complaint, upon the ground that defendant's motion for a directed verdict should have been granted. Plaintiff appeals.

W. C. Seefeld of Milwaukee, for the appellant.

For the respondent there was a brief by *Clifton Williams,* city attorney, and *John M. Niven,* first assistant city attorney, and oral argument by *Mr. Niven.*

JONES, J. Appellant was walking along a six-foot-wide cement sidewalk on Sixteenth street in the city of *Milwaukee* on a winter evening. It was "not light." She had seldom used this street and consequently was not well acquainted with the condition of the walk. She came to an alley crossing of which she knew. The alley was paved with cobblestones. The crosswalk was constructed as follows: There were two rows of level flagstones stretching across the alley connecting the ends of the sidewalk on either side. Each row was slightly over a foot wide, and there was a space of a little over a foot in width between them paved with cobblestones. Outside of the flagstones on either side was the cobblestone pavement sloping away from the flagstones so as to facilitate the passage of vehicles. The ends of the cement walk were sloped down to the level of the crossing, the flagstones being four inches below the level of the walk, the slope of the walk to the flagstones being four inches in fourteen and one-half inches.

According to appellant's testimony she stepped from the regular level of the cement walk at the point where the downward slope commenced about twenty-five inches, and stepped, as she later found, upon a cobblestone outside the area of the flagstones. The region of this cobblestone is seven inches below the level of the cement walk at the point from which she stepped; and this particular stone is eight by seven inches, projects two inches at its highest point above

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the level of the adjacent ground, has a sloping surface, and lies between the flagstones and the inner edge of the cement walk as extended across the alley, being twelve inches from the latter line. The alley was icy, and she slipped upon the stone and fell, receiving injuries to her arm.

The jury by its special verdict found that appellant did not fall by reason of the slippery condition of the walk, but that the walk was in an insufficient condition and not reasonably safe for pedestrians, and that this was the proximate cause of the injury. The trial judge believed that a jury question was presented and gave judgment for appellant, but the circuit court, on appeal, held that the testimony did not show an actionable structural defect in the alley crossing.

Although the complaint claimed as part of the insufficiency of the walk that it was icy, the plaintiff's attorney expressly waived at the trial any claim on this ground and based the cause of action on the faulty construction of the walk. In a recent case Mr. Justice OWEN said:

"As was pointed out in *Wheeler v. Westport,* 30 Wis. 392, almost innumerable circumstances, such as the topography of the locality, the development of the community, the standard of road construction attained therein, the amount and character of traffic, etc., are to be taken into consideration in determining whether a given condition renders a highway defective. Such is still the law. That which will render one highway defective will not condemn another." *Branegan v. Verona,* 170 Wis. 137, 140, 174 N. W. 468.

This rule applies to sidewalks in cities as well as to country highways. In the present case the walk was in a residential district remote from the most traveled streets in the business center. The portion of the walk across the alley intended for the main line of travel consisted of two rows of flagstones and the cobblestones between, all practically level. It is not claimed that there was any defect arising from the fact that there was a slope of four inches

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in a distance of fourteen and one-half inches on the cement walk approaching the flagstone portion of the walk. But it is claimed that a slope of seven inches to the point where the accident occurred is a defect. The testimony and photograph in evidence show that if the alley crossing had been made level with the street it would have necessitated an abrupt and a considerable drop from the cement walk to the crossing. Owing to differences of grades, necessity for providing for drainage, and other conditions, such construction is common and necessary in most cities and one from which accidents occasionally happen to those who do not "watch the step." It has been frequently held that when such steps from the walk to the crossing are properly constructed they do not make the highway defective, and that pedestrians should be on the lookout when they reach a street crossing. *Miller v. St. Paul,* 38 Minn. 134, 36 N. W. 271; *Morgan v. Lewiston,* 91 Me. 566, 4 Atl. 545; *Shippy v. Au Sable,* 65 Mich. 494, 32 N. W. 741; *Bigelow v. Kalamazoo,* 97 Mich. 121, 56 N. W. 339; *Chicago v. Bixby,* 84 Ill. 82; *Hoyt v. Danbury,* 69 Conn. 341, 37 Atl. 1051.

In establishing the grades in this instance the city authorities evidently deemed it best, instead of adopting such a mode of construction, to have a gradual slope in the cement walk, and also a slope in the alley approaching the crosswalk on either side to facilitate the passage of teams and vehicles. In planning crosswalks over alleys and courts the convenience and rights of all classes of travelers are to be considered, but absolute safety can be guaranteed to none.

In the instant case the plaintiff claims that she slipped on the projecting cobblestone. This was about three inches lower than the edge of the cement portion of the walk. The accident would have been quite as likely to happen if there had been a perpendicular drop in the walk over which plaintiff had stepped. It would seem to follow that the slope in the walk had little or no connection with the

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accident. In fact, the claim as to the defect seems to be based chiefly on the fact that one of the cobblestones projected above the others from one and one-eighth to two inches. There was evidence that the use of this material is common in *Milwaukee* in paving alleys and that the alley in question was the regular cobblestone construction. No claim is made to the contrary or that improper material was used. When cobblestones are used in the construction of alleys or portions of walks there will necessarily be more variation from a level surface than when brick or cement is used. In planning for the construction of walks over alleys and streets where there are inequalities in the surface, municipal officers may assume that pedestrians will use some care and will seek to avoid dangers which are obvious. In this case, although it was not light, the plaintiff knew that she had approached an alley crossing and that it was icy.

As already indicated, walks and crosswalks are not required to be perfect. It suffices if they are reasonably safe. There may be inequalities, projections, and depressions so slight that municipal authorities may assume that they will not cause injury to persons using ordinary care. *Kleiner v. Madison,* 104 Wis. 339, 80 N. W. 453; *Snyder v. Superior,* 146 Wis. 671, 132 N. W. 541; *Kawiecka v. Superior,* 136 Wis. 613, 118 N. W. 192; *Padden v. Milwaukee,* 173 Wis. 284, 181 N. W. 209; *Cook v. Milwaukee,* 27 Wis. 191; *Burroughs v. Milwaukee,* 110 Wis. 478, 86 N. W. 159; *Hamilton v. Buffalo,* 173 N. Y. 72, 65 N. E. 944; *Butler v. Oxford,* 186 N. Y. 444, 79 N. E. 712; *Bigelow v. Kalamazoo,* 97 Mich. 121, 56 N. W. 339; *Newton v. Worcester,* 174 Mass. 181, 54 N. E. 521. We consider that the circuit judge was right in assuming that the projection in question belonged to that class.

By the Court.—Judgment affirmed.

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SEIDL, by guardian *ad litem*, Appellant, vs. KNOP, Respondent.

May 4—May 31, 1921.

Master and servant: Automobiles: Employee giving third party ride: Negligence as to latter: Liability of master.

1. Where a truck driver digressed from the proper side of the road to pick up plaintiff, whom he had invited to ride with him in violation of his duties to his employer, the employer was not liable for the driver's negligence in running into plaintiff, since the act of the employee in digressing from his usual course was an act outside of his employment.
2. An act of a servant or agent cannot be deemed to be within the course of the employment unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The action was brought by plaintiff for personal injuries claimed to have been sustained when plaintiff was struck by a truck belonging to the defendant and driven by his employee, Walter Reese.

On the day of the accident Walter Reese invited the plaintiff to ride with him from the gravel pit of defendant towards town. During this journey an arrangement was made between them whereby Walter Reese was to meet the plaintiff about 4 o'clock in the afternoon of the same day at a saloon on the Port Washington road on his return to the gravel pit. As Walter Reese drove the truck going north on the Port Washington road towards the saloon at the arranged time, plaintiff stepped out into the middle of the road and waved his hand, indicating that Reese should stop the truck for the purpose of taking him on. The truck was about two blocks away at the time that the plaintiff first observed it, and was coming north on the east of the middle of the road. As Reese approached the plaintiff he

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crossed the road towards him and turned his course in the plaintiff's direction, intending to stop the truck to the west of the plaintiff so that the plaintiff would have an opportunity of taking the seat on the truck on the right-hand side, Reese being seated on the left-hand side of the truck. As the truck approached the plaintiff he also moved to the west towards the curb. The truck collided with plaintiff from three to six feet east of the curb. Plaintiff claims that when he first saw the truck approaching, Reese was driving at a rate of between twelve and twenty miles per hour, which speed he diminished to eight or ten miles per hour as he approached plaintiff. Reese, on the other hand, contends that when he first observed plaintiff he was driving at about eight miles per hour. Plaintiff further contends that after the accident Reese admitted that he had been playing with plaintiff and was attempting to scare him as he approached. This was denied by Reese.

Two principal defenses were raised by defendant: first, that at the time of the accident Walter Reese was not acting within the scope of his employment; and second, that there was no negligence on the part of Walter Reese, but that the collision was caused by the contributory negligence of plaintiff.

The trial court directed a verdict in favor of defendant and ordered judgment dismissing the complaint. The circuit court, after hearing the appeal, affirmed the decision of the trial court. Appeal is taken from this judgment.

For the appellant there was a brief signed by *Ray J. Cannon,* and oral argument by *Mr. Cannon* and *Mr. A. W. Richter,* both of Milwaukee.

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Horan.*

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SIEBECKER, C. J. The plaintiff claims that the defendant is liable for the injury he sustained upon the ground that the alleged negligence of Reese, as driver of defendant's truck, was an act in the execution of his general authority, and hence at the time of the collision he was acting within the scope of his employment. On the part of the defendant it is claimed that the facts and circumstances show that at the time of the accident Reese and the plaintiff were engaged in executing a personal arrangement to give plaintiff a ride on the truck, and that Reese digressed from his course of driving the truck and therefore was outside of his authority and the course of his employment. The general rule of law respecting the master's liability for the acts of his servant in cases of this nature has been repeatedly adverted to in the decisions of this court under a variety of circumstances and conditions. Among them are the following: *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658; *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554; *Firemen's F. Ins. Co. v. Schreiber,* 150 Wis. 42, 135 N. W. 507; *Gewanski v. Ellsworth,* 166 Wis. 250, 164 N. W. 996; *Oakes v. Marshall-Wells H. Co.* 158 Wis. 165, 147 N. W. 832; *Smith v. Yellow Cab Co.* 173 Wis. 33, 180 N. W. 125; *Thomas v. Lockwood Oil Co. post,* p. 486,182 N. W. 841. It is undisputed that plaintiff, while riding with Reese on the trip with the truck in the morning, arranged with Reese to meet him on the Port Washington road in the afternoon and ride home with him on the truck, and that they were engaged in carrying out this arrangement when the accident occurred. It is clear that Reese violated his duties towards defendant in engaging to carry other persons on the truck. It also appears that he digressed from the proper side of the road to the wrong side to pick up plaintiff for a ride on the truck, thus doing

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the very thing he had no authority to do. Can it be said that, because at the time of doing these unauthorized acts he was engaged in driving the truck on a trip to get a load of gravel, the plaintiff's injuries were caused by Reese while acting in the course of his employment? As has been often said, the rule is plain, but its application is not always readily perceived. We think the law on this subject as stated in the text of sec. 1880, 2 Mechem, Agency (2d ed.), is helpful in these cases. It is there said:

"Not every act which an agent or servant may do while he is in the place appointed for the service, or during the time in which he is engaged in the performance, can be deemed to be within the course of the employment, or within the scope of the authority. The test lies deeper than that; it inheres in the relation which the act done bears to the employment. The act cannot be deemed to be within the course of the employment unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated."

It is manifest that the arrangement between plaintiff and Reese to take plaintiff on the truck and give him a ride on this trip was a wholly disconnected act of Reese's employment, and that Reese's course of driving from the proper side of the road to the wrong side for the purpose of taking plaintiff on the trip was not a part or incident of the service involved in his employment, and therefore was an act outside of the course of his employment. The trial court properly held that plaintiff's complaint should be dismissed.

By the Court.—The judgment appealed from is affirmed.

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NEWPORT MINING COMPANY, Respondent, vs. FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, Appellant.

May 4—May 31, 1921.

Insurance: Property insured: Lumber and building material: Uncompleted buildings: Mutual mistake: Reformation of contract: How pleaded.

1. A fire insurance policy covering "lumber and building material located on property situate on" described land is construed to cover all lumber and building material upon the described premises, whether piled in the open or under cover or in buildings, including that contained in partly completed dwelling houses.
2. An answer alleging that it was intended that the policy was to cover only lumber piled in the open, without an allegation of fraud, mutual mistake, or a prayer for reformation of the contract, does not raise an issue as to whether the policy should be reformed because of mutual mistake in its execution.
3. Without reformation a defendant sued on contract could not, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of the contract.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action upon an insurance policy which reads: "Palms Mine Location, *Newport Mining Company.* $4,000 on lumber and building material located on property situate on section 14, township 47 north, range 46, near Bessemer, Gogebic county, Michigan." There was no dispute as to the description of the real estate on which the insured property was located, and the second amended answer admitted all the allegations of the complaint, which stated a good cause of action upon the policy, but alleged that the policy covered only lumber piled in the open; that all the loss save $52.64 occurred on lumber contained in two partly finished dwelling houses situated upon the described premises; that the defendant did not know of the existence of such partly finished dwelling houses when the policy was

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issued; that it was the intention of the parties to cover only lumber piled in the open, and that under the laws of Michigan a different rate from that on lumber in the open obtained on lumber and building material contained in a building, but it does not state that the latter was higher or what either rate was. It is alleged that the rate charged in the policy was for lumber piled in the open. The court sustained a demurrer to the second amended answer and entered judgment for plaintiff upon the pleadings. The defendant appealed.

For the appellant there was a brief by *Seymour Edgerton,* attorney, and *Wangerin & Wengert,* of counsel, all of Milwaukee, and oral argument by *Eugene Wengert.*

For the respondent there was a brief by *Fawsett & Smart,* and oral argument by *Edmund B. Shea,* all of Milwaukee.

VINJE, J. It is obvious that the policy as written covered all lumber and building material upon the premises described whether piled in the open or under cover or in buildings. The defendant was twice permitted to amend its answer, but it never claimed that through fraud, mistake, or inadvertence the policy was not written as intended. It did not ask for a reformation of the contract, but alleged that the intention, expressed in the written policy, was that only lumber in the open was covered by it. This constituted but a legal defense, the validity of which must be tested by the language of the contract entered into. It did not call for equitable relief by way of reformation. Without reformation defendant could not, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of the contract. *Casgrain v. Milwaukee Co.* 81 Wis. 113, 51 N. W. 88; *Elofrson v. Lindsay,* 90 Wis. 203, 63 N. W. 89; *Miller v. Metz,* 103 Wis. 220, 79 N. W. 213; *Schmidt v. Schmidt's Estate,* 123 Wis. 295, 101 N. W. 678; *Garage E. M. Co. v. Danielson,* 156 Wis. 90, 144 N. W. 284; *Jilek v. Zahl,* 162 Wis. 157, 155 N. W. 909.

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Without an allegation of fraud, mutual mistake, or a prayer for reformation of the contract, it was the duty of the court to construe the contract as written. As before stated, the written policy clearly covered lumber and building material contained in partly completed houses.

By the Court.—Judgment affirmed.

SEIDL, Appellant, vs. PAULU and others, Respondents.

May 5—May 31, 1921.

Mortgages: Forgery of release: Degree of proof: Presumption from recording: Negligence in signing release: Innocent purchasers: Estoppel.

1. The presumption under sec. 4156, Stats., that a recorded release in proper form was duly executed, is not conclusive, but the mortgagee may show that the release is a forgery and void; but proof of such forgery must be clear, convincing, and satisfactory. Where, however, the original document of which the record is a copy is destroyed and thus part of the evidence is lost, the strict rule will be relaxed; and the presumption is likewise weakened where the acknowledging officer acted fraudulently.
2. If plaintiff, seeking cancellation of a mortgage release and foreclosure of the mortgage, signed the satisfaction, which was of record when the land was purchased by the defendants, there was some element of neglect or want of caution on her part, and the instrument was not absolutely void as in the case of forgery; and the rule that, if one of two innocent parties must suffer, the loss must be borne by one whose want of care has enabled the third person to commit the wrong or fraud, applies against plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: G. N. RISJORD, Judge. *Affirmed.*

Action to set aside a mortgage release executed in the name of plaintiff and recorded, but which plaintiff claims is a forgery, and for foreclosure of the mortgage. Judgment was entered for defendant dismissing the complaint. Plaintiff appeals.

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The appellant is a widow sixty-five years of age. One Best, a stock and bond broker and her son-in-law, helped her in attending to her affairs and in large part took charge for her of the transactions here involved. The respondent *Emma Paulu* was the owner of the lots upon part of which the mortgage in question was placed. Her husband, John Paulu, was a real-estate dealer and seems for the most part to have conducted the negotiations for her.

On February 19, 1912, *Emma Paulu* gave to appellant a mortgage for $2,500 upon the east forty-one feet of certain lots in the city of Milwaukee therein described. At the same time she executed another mortgage to appellant for a like amount on the west thirty-eight feet of the east forty-one feet of said lots. Both were promptly recorded. It appeared that the description in the latter mortgage was incorrect, the description intended being the west thirty-eight feet of the east seventy-nine feet. The former of these mortgages is the one sought to be foreclosed; the indebtedness secured by it has not been paid.

In the spring of 1913 respondents *Wilson* commenced negotiations with respondent *Paulu,* acting through John Paulu, for the purchase of the said east forty-one feet, and engaged a firm of real-estate agents, of whom respondent *Ewens* was one, to look after their interests. The *Wilsons* refused to assume any existing mortgage as part of the purchase price, and Paulu agreed to have the mortgage released, and also to get a release of the other mortgage appearing of record upon the west thirty-eight feet of the east forty-one feet. About two weeks thereafter Paulu caused to be recorded two releases, one for each of the mortgages, describing them by volume and page of record, each purporting to have been executed by appellant. He then exhibited to respondents *Wilson* an abstract showing both mortgages released of record, and the *Wilsons* thereupon bought the premises in good faith, relying upon the record

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title, paid full consideration, and executed to respondent *Ewens* a mortgage on the premises to secure a loan made by him to the *Wilsons,* he also acting in good faith.

The trial judge found the foregoing facts substantially as stated. It appeared from the testimony on behalf of appellant that at about the time the releases were recorded by Paulu appellant had executed a release which was intended by her and Best to release the mortgage with the erroneous description, and that in exchange for it Paulu delivered a new mortgage upon the proper description of the west thirty-eight feet of the east seventy-nine feet. This release was drawn up in Paulu's office and was taken by Best to appellant's home for the purpose of her signing it, it being agreed that she might sign it in that way and that her acknowledgment would be certified to by Paulu, who was a notary, upon recognition of her signature, which he had seen when the original mortgages were executed over a year previously but had not seen otherwise. The release was signed by appellant, witnessed out of her presence by Paulu and his stenographer, and the acknowledgment certified by Paulu.

After thus executing one release Paulu placed the two of them, one of which was probably a forgery, on record. In answer to a question of the court whether, through mistake, the release might not have been also of the mortgage in question, Best answered: "No, because I took special attention that it was not the other—only the one—I was very careful at the time so he would not release both; I wanted the one." He did not describe just what precautions he took, and in speaking of the transaction in Paulu's office, at which the release was exchanged for the new mortgage with the correct description, he testified that he did not remember whether descriptions were compared at the time or not.

The trial court further found, upon these issues, that the second mortgage described was released for the reason that

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the description of the premises was erroneous; that the appellant signed a release on May 23, 1913, of one of the mortgages, and intended to sign a release only of the second mortgage described and not of the mortgage involved in this action, and if she did sign a release of the mortgage in this action it was done through mistake on her part and through fraud and misrepresentation on the part of Paulu, but that he was unable to say, from the evidence, whether plaintiff actually signed a release of the mortgage here in question or only a release of the other mortgage, and he was unable to say that Paulu forged a release of this mortgage, and that it may be that plaintiff actually signed a release of the mortgage in question supposing it was a release of the other.

Neither Paulu nor the other witness to the release appears to have been called. It appeared that Paulu was in the house of correction, and when asked by appellant for the originals of the recorded releases replied that he believed they were among papers which had been stolen from his office. Respondents introduced no testimony upon the genuineness of the release in question.

After these transactions, which took place in May, 1913, Paulu continued until 1918 to pay the interest to appellant upon the mortgage in question, appellant continued to hold an abstract and insurance policies upon the premises, and when the debt became due in five years from 1912 it was extended for three years by agreement with Paulu acting for his wife. It was not until negotiations for the renewal of the insurance upon the premises in 1918 that respondents *Wilson* and *Ewens* became aware of appellant's claim or that appellant became aware of the supposed release of her mortgage, and when this discovery was made Paulu disappeared.

The trial court concluded that the *Wilsons* had a right to rely on the record showing release; and that, the evidence not clearly and satisfactorily showing that the release of the

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mortgage in question was forged, it must be held that the release is effective as against the *Wilsons* and *Ewens* and as to them could not be set aside.

Otto C. Schumacher of Milwaukee, for the appellant.

For the respondents *Wilson* there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *H. H. Otjen.*

JONES, J. The plaintiff alleged in her complaint that the release relied on by defendant was a forgery. To establish this claim plaintiff's attorney relied on the facts that the interest on the mortgage was paid for more than five years, evidently for the purpose of concealing the fraud, the assertion of Paulu that the original papers relating to the satisfaction had been stolen, and that when inquiry was made he disappeared. Reliance is also placed on the positive statement of the plaintiff that she never executed the satisfaction in question, and the statement of her agent that he never saw her sign such a paper.

Defendant claims that these facts do not establish forgery because the records show that there was a release of the mortgage on record executed on the same day when admittedly she signed a satisfaction, and that neither the plaintiff nor her agent compared the description in the release which was conceded to have been signed.

Each party makes the claim that the other was guilty of want of ordinary care which contributed to the unfortunate result. Plaintiff's counsel argues that defendants should have made investigation beyond an examination of the record to ascertain whether the release was genuine and should have demanded the production of the canceled note and mortgage. In this connection it is to be borne in mind that defendants did not undertake to pay the mortgage owned by plaintiff or to assume it. It is true they knew of its existence, but they expressly refused to take the title subject to a mortgage. They demanded a clear title. They

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were dealing with the land and not as the payers of a debt and therefore did not come within the rule that a debtor, where the debt is evidenced by a negotiable note and recorded mortgage, has no right to rely on the records in paying the debt to another than the real creditor, his authorized agent, or one in actual possession of the note. *City Bank v. Plank,* 141 Wis. 653, 124 N. W. 1000; *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69.

It is further urged that defendants were put upon notice by the fact that, although they knew there had been an original abstract showing incumbrances, Paulu furnished a new one showing their release. Those who have had considerable experience in dealing with abstracts know that they are almost as easily lost or mislaid as umbrellas. Owners of land will scrupulously cherish old recorded documents often of little or no value and pay little attention to their unrecorded abstracts. We are satisfied that in the production of the second abstract there was nothing which should have aroused suspicion in the minds of defendants or those who acted for them in the transaction.

So far as the testimony shows, the defendants and their agents acted prudently and took all the precautions usually taken in obtaining interests in or title to real estate. This cannot be said of the manner in which the plaintiff and her agent conducted her part of the business. They seemed to place implicit confidence in the unfaithful Paulu, although his interest and that of plaintiff were in conflict. He was intrusted with the business of preparing and acknowledging a release of a mortgage which had been executed by his wife. Plaintiff caused to be delivered to him a document which she had signed which was incomplete as to acknowledgment and witnesses. He and his clerk signed as witnesses and he went through the form of taking the acknowledgment, all in the absence of plaintiff and without any direct communication with her. Although this was a very irregular

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mode of transacting the business it may not have contributed to the result complained of. A far more serious weakness in the plaintiff's case is the very unsatisfactory nature of the proof as to the identity of the instrument which she signed. The plaintiff's testimony on this subject is entitled to no weight, since she swears positively that she signed no release whatever, although it is clear from the other evidence that she did sign one on the same day that two were recorded. She evidently paid little attention to the business and left it to be carried on by Paulu and her son-in-law, Mr. Best. Although Best swore that plaintiff never signed the release in question, the weight of his testimony is seriously impaired by his other testimony to the effect that he could not state that there had been any comparison of descriptions.

It is claimed by defendant's counsel that since the defendant without any notice paid full value for the land relying upon a clear record title, he should be protected even if the release was a forgery. To this we do not agree. It would be an intolerable rule that through the instrumentality of the recording acts a person without any fault on his part could be robbed of his estate by forgery. When defendant's agents examined the records they found thereon a formal release duly executed, witnessed, and acknowledged. According to sec. 4156, Stats., this was presumptive evidence of the due execution of the instrument. Under similar statutes the courts have gone very far in upholding the titles of innocent purchasers who have relied upon clear record titles. In *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323, Mr. Justice DODGE said:

"No rule is more firmly established in this state than that, to justify a finding against the execution, according to its terms, of a formal conveyance, duly acknowledged, the evidence must be perfectly clear, convincing, and satisfactory; that the defense must be established beyond all reasonable

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controversy,—indeed, as some authorities put it, beyond a reasonable doubt."

In somewhat varying language the same general rule is declared in most states. 1 Corp. Jur. 893 *et seq.*

"The reasons for these rules are obvious and satisfactory. They are essential to the security of titles. If the solemn deed of a party to real estate, duly attested by a public officer and recorded according to law, may be avoided by the grantor's individual oath or by anything short of clear and convincing evidence, the efficacy of recording statutes is largely destroyed, and the title to such property is precarious indeed. Public policy, as well as individual security, require that the ownership and peaceful possession of land should be subjected to no such hazard." 1 Corp. Jur. 897, quoting *Chivington v. Colorado Springs Co.* 9 Colo. 597, 605, 14 Pac. 212.

But the presumption declared in the statute is not conclusive, and plaintiff had the undoubted right to prove that the instrument in question was a forgery and hence utterly void. *Blount v. Blount,* 158 Ala. 242, 48 South. 581, 21 L. R. A. N. S. 755; *Vesey v. Solberg,* 27 S. Dak. 618, 132 N. W. 254. In this case it was claimed, doubtless in good faith, that the forgery was committed by the husband of the defendant *Paulu* and that he had destroyed the original document of which the record was a copy and thus destroyed in part the evidence of his criminal act. If the original document were produced, it might with the aid of extraneous evidence clearly show the forgery. Under such circumstances it would seem unjust to require the plaintiff to prove by the strict rule above pointed out that the document was forged. In a recent well reasoned case where in some respects the facts were quite similar, the court held that under such circumstances the strict rule should be relaxed, and to this we agree. *Vesey v. Solberg,* 27 S. Dak. 618, 132 N. W. 254. In the present case, moreover, the presumption would seem to be weakened by the fact that the acknowledging officer acted fraudulently.

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Although the trial judge seemed to consider that it was necessary for plaintiff to prove the forgery by clear and satisfactory proof and based his decision on that theory, we have carefully examined the evidence and have come to the conclusion that plaintiff failed to establish the allegations of the complaint even by a preponderance of evidence. It is argued by plaintiff that, since the court found that she never intended to sign the document in question and that fraud was practiced upon her, the mortgage should be reinstated. This raises an entirely different question from that already discussed. If she signed the satisfaction there was some element of neglect or want of caution on her part, and the instrument was not absolutely void as it would be in the case of forgery. In such case she could not have the mortgage reinstated as against an innocent purchaser. She would be to some extent responsible for the recording of the release. She would be barred by the familiar rule that when one of two innocent parties must suffer loss it must be borne by the one whose want of care has enabled the third person to do wrong or perpetrate the fraud which caused the loss. *Wittenbrock v. Parker,* 102 Cal. 93, 36 Pac. 374, 24 L. R. A. 197; *Robbins v. Todman,* 28 Kan. 491; *Heyder v. Excelsior B. L. Asso.* 42 N. J. Eq. 403, 8 Atl. 310; *McConnell v. American Nat. Bank,* 59 Ind. App. 319, 103 N. E. 809.

We agree with the trial court that the allegations of the complaint are not proved and that the action should be dismissed.

By the Court.—Judgment affirmed.

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PEDRO, Appellant, vs. GROOTEMAAT, Respondent.

May 5—May 31, 1921.

Taxation: Sales of land for taxes: Notice and statement of sale: Uniform county government: Posting and publication: Proof: Constitutional law: Special legislation: Disposition of case.

1. Under sec. 1130, Stats., the posting as well as the publishing by the county treasurer of a statement of all lands upon which the taxes have not been paid, together with a notice of tax sale thereof, is essential to the validity of a tax deed, the word "post" having a meaning distinct from that which is implied by the term "publication."
2. Sec. 1131*a*, Stats., dispensing with such publication, in counties containing a city of the first class, of a statement of the lands on which taxes are delinquent, required by sec. 1130 generally, is special legislation, violative of sec. 23, art. IV, Const., requiring the establishment of but one system of town and county government, which shall be as nearly uniform as practicable, and of sec. 31 of art. IV, prohibiting the enactment of any special law for assessment or collection of taxes, the classification having no logical basis.
3. The deposit by plaintiff of the amount of taxes, etc., required by secs. 1210*h* and 1210*h*—1, Stats., as a prerequisite to the maintenance of an action to set aside a tax sale or to cancel a tax certificate or to restrain the issuing of a tax deed, is not necessary in an action of ejectment, where plaintiff is entitled to recover by reason of a defect in defendant's tax title, this matter being governed by sec. 3087, Stats.
4. Upon a determination by this court that the judgment in defendant's favor was erroneous because of defects or deficiencies occurring in the tax proceedings, the judgment is ordered affirmed, unless within ninety days the plaintiff will repay the amounts expended by the defendant for taxes and disbursements with interest at the rate of fifteen per cent.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed upon condition.*

This is an action in ejectment, brought by the plaintiff, the original owner of the premises in question, against the defendant, who claims title under a tax deed.

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The complaint, among other things, alleges that the plaintiff has an estate in fee simple in the south twenty (20) feet of lot numbered eight (8), and all of lot numbered nine (9), in block ten (10), in College Heights, part of the southwest quarter of section numbered three (3), in township numbered seven (7) north, of range numbered twenty-two (22) east, in the village of Shorewood, in the county of Milwaukee and state of Wisconsin; that the plaintiff is entitled to the possession of said premises; that the defendant unlawfully withholds the same from her, to her damage.

Judgment against the defendant for the possession of the premises is demanded, and for six cents damages, and the costs and disbursements of the action.

The answer denies the plaintiff's claim of an estate in fee simple, and also denies that she is entitled to the possession of said premises and that he unlawfully withholds possession from the plaintiff; and denies that the plaintiff has sustained any damages whatever.

Furthermore, the defendant alleges that the real estate above described was on the 18th day of May, 1915, sold by the county treasurer of Milwaukee county, Wisconsin, for the nonpayment of the taxes which were duly assessed and levied upon and against said premises for the year 1914 by the proper authorities, for the sum of $137, to one Charles L. Borst, to whom certificates of sale were duly issued as provided by law; that the said Borst thereafter, for value, duly assigned such certificates to the defendant; that the owners or claimants of said lands did not redeem the same from such sale, and that upon due proceedings had in that behalf the county clerk of Milwaukee county did, on July 31, 1918, upon surrender of said tax certificates, duly make, issue, and deliver to the defendant a tax deed in the manner and form as provided by law, by virtue of which said real estate was assigned, transferred, and conveyed to the defendant, his heirs and assigns; that said deed was duly

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recorded in the office of the register of deeds of Milwaukee county, Wisconsin, on August 1, 1918, in volume 546 of Deeds, on page 525; that thereby the defendant became and now is the owner and holder of the title in fee to said premises. The defendant thereupon demands the dismissal of plaintiff's complaint, with costs. The action was commenced on September 27, 1919.

There is practically no dispute as to the facts in the case. The circuit court found that the plaintiff was the owner in fee simple of the real estate in question prior to the issuance of a tax deed, but that she had subsequently been divested of her title by virtue of the tax deed. The lower court thereupon entered judgment in accordance with such findings.

The sole question in the case is whether the tax deed was or was not a valid deed.

Plaintiff sets forth eleven specific claims on the basis of which she maintains that the tax deed is invalid. It will be necessary to consider but a few of these claims so set forth. Among other things it is claimed that said tax deed is invalid:

First. Because the county treasurer did not post the notice and statement required by sec. 1130, Stats., or any notice of similar force or effect.

Second. Because there is no proof of the posting of the notice and statement of the tax sale as required by sec. 1130, Stats.

Adolph Kanneberg and *K. K. Kennan,* both of Milwaukee, for the appellant.

For the respondent there was a brief by *Roehr & Steinmetz* of Milwaukee, and oral argument by *Julius E. Roehr.*

DOERFLER, J. Sec. 1130, Stats., among other things, provides as follows:

"The county treasurer shall, on the fourth Monday of April in each year, make out a statement of all lands upon

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which the taxes have been returned as delinquent and which then remain unpaid, . . . containing a brief description thereof, with an accompanying notice stating that so much of each tract or parcel of land described in said statement as may be necessary therefor will, on the second Tuesday in June next thereafter and the next succeeding days, be sold by him at public auction at some public place, naming the same, at the seat of justice of the county, for the payment of taxes, interest and charges thereon; . . . and cause such statement and notice to be published in a newspaper printed in his county . . . once in each week for four successive weeks prior to said second Tuesday in June; and such treasurer shall also, at least four weeks previous to said day, cause to be posted up copies of said statement and notice in at least four public places in such county, one of which copies shall be posted up in some conspicuous place in his office; . . ."

Sec. 1132, Stats., provides:

"Every printer who shall publish such statement and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication made by some person to whom the fact of publication shall be known; . . . and the county treasurer shall also make or cause to be made an affidavit or affidavits of the posting of such statement and notice as above required, which affidavits, together with the affidavit of publication, shall be carefully preserved by him and deposited as hereinafter specified."

The foregoing are general statutes, applicable to all counties in the state.

In the year 1913 the legislature enacted sec. 1131*a*, which provides as follows:

"Section 1131*a*. In all counties containing a city of the first class the statement and description, provided for in section 1130 of the statutes, of lands upon which taxes have been returned as delinquent, shall not be published as provided in sections 1130 and 1131 of the statutes, but it shall be sufficient in such counties to publish a notice, once in each week for four successive weeks, in three daily newspapers

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published in the English, German and Polish language stating that all tracts or parcels of land upon which the taxes remain unpaid will be sold at a time and place specified in such notice, which time and place shall be the same as is provided in section 1130 of the statutes."

Sec. 1131*a* relates solely to the publication of the notice as therein provided. Nothing is provided in said section with respect to the posting of the notice, and it also appears that while sec. 1130 expressly provides for a publication of the statement and notice referred to in said section, sec. 1131*a* attempts to amend said sec. 1130 by requiring a publication once in each week for four successive weeks in three daily papers published in the English, German, and Polish language.

There is no suggestion in sec. 1131*a* which dispenses with the posting of the notice as is provided for in sec. 1130.

The county treasurer did not post the notice and statement required by sec. 1130, Stats.

The question therefore arises whether sec. 1131*a* contemplates that the posting of the statement and notice shall be dispensed with. Now, in view of the fact that sec. 1130 provides both for a publication of the notice and statement therein referred to, and also for the posting of the statement and notice referred to therein, and that sec. 1131*a* was enacted as an additional section to the Statutes, and simply provides for a change in the publication of the notice, but does not in any way amend sec. 1130 with respect to the posting of the statement and notice therein required, a failure to post such notice and such statement constitutes a fatal omission on the part of the county treasurer. If it was contemplated by sec. 1130 that a publication in a newspaper would comply with all of the requirements of the statute, it would have been superfluous to say anything at all with respect to the posting of the statement and notice. The publication and posting are treated as totally separate and distinct matters by the statute. They are separate and dis-

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tinct means of giving notice to the public of delinquent and unpaid taxes, the object and purpose being to give the widest possible publication by both methods set forth in sec. 1130, Stats.

We are therefore of the opinion that in order to comply with sec. 1130, Stats., the notice and statement must be published and the notice and statement required in said section posted.

It is said in the case of *Jarvis v. Silliman,* 21 Wis. 599, 601:

"If a copy of the notice was not posted up in the treasurer's office, does the failure to comply with the law in that respect render the deed invalid? The giving notice of a tax sale in the time and manner prescribed by law is generally a prerequisite to the validity of a tax title. The officer derives his power of sale in part from the notice, and in this respect his sale differs from the sale of land by a sheriff on execution. Any neglect of the officer selling land for the nonpayment of taxes, which deprives the owner and bidders of the full information the law intended to give them, renders the sale invalid. Blackwell, Tax Titles, 253, 254."

Furthermore, the word "post" as used in sec. 1130 has a meaning distinct from what is implied by the term "publication." It means to "attach to a post, a wall, or other place of affixing public notices." Webster, Internat. Dict. Also, "to bring to the notice or attention of the public by affixing to a post, or putting up in some public place." Standard Dict. See, also, *Allen v. Allen,* 114 Wis. 615, 623, 91 N. W. 218.

The second point made by plaintiff's counsel refers to there being no proof of the posting of the notice or statement of the tax sale as required by sec. 1130.

It appearing from the testimony that there was, as a matter of fact, no posting of the notice or of the statement as required by sec. 1130, there was therefore no proof by affidavit of such posting. And not only is it necessary to

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post a notice and statement in the office of the county treasurer, but the statute requires that they shall be posted in some conspicuous place in his office; and where the affidavit, instead of complying with the provisions of the statute in that regard, simply states that a copy was posted at the office of the county treasurer instead of "in some conspicuous place" in his office, it was held that this defect was fatal to the validity of a tax deed.

It is said in *Hilgers v. Quinney,* 51 Wis. 62, 71, 8 N. W. 17, where the affidavit merely recited that the notice and statement were posted in the office of the county treasurer:

"This is a clear noncompliance with the statute, too apparent and substantial to require further consideration than mere mention. These defects are fatal to the validity of the tax deed."

Sec. 1131*a,* it is contended by the plaintiff, is unconstitutional as violating the provisions of sec. 23, art. IV, of the constitution of Wisconsin, which reads as follows:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

And of sec. 31, art. IV, which provides:

"The legislature is prohibited from enacting any special or private laws in the following cases: . . . 6th. For assessment or collection of taxes or for extending the time for the collection thereof."

There is only one county in Wisconsin which comes under the provisions of sec. 1131*a,* and that is Milwaukee county.

Legislation of the character of sec. 1131*a* has been frequently attacked on constitutional grounds by the contention that it violates the provisions of the constitution above set forth.

This court, in an early case, in *State ex rel. Walsh v.*

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Dousman, 28 Wis. 541, held that wherever uniformity is practicable it must be preserved.

In *State ex rel. Merrimac v. Hazelwood,* 158 Wis. 405, 149 N. W. 141, which involved the constitutionality of ch. 586, Laws 1913, providing for the construction of a certain bridge and requiring two counties to levy and collect certain fixed amounts of taxes for that purpose, it was held:

"The attempt to provide for the construction of this bridge in an entirely different way from that provided in the general system must be held to violate the requirement of uniformity, inasmuch as it does not appear that it is impracticable to build the same under the general system."

It is contended by the defendant that it is impracticable for the county treasurer of Milwaukee county to publish the list of different lands in the notice of tax sale. The reason for the enactment of sec. 1131*a* is set forth in the testimony of Mr. Smith, the chief clerk in the county treasurer's office at Milwaukee, as follows:

"It was largely passed to eliminate from the county treasurer's office that service which did not seem to interest anybody excepting a few tax buyers, and that the time was too short in which to advertise a description of all of the delinquent pieces of real estate. . . ."

It needs but little reflection to realize the object to be accomplished by the publication of the statement referred to in sec. 1130, Stats., and of the posting of the notices as therein required. Such statement and notice, when published in Milwaukee county, and when posted as required by sec. 1130, constitute as great an advantage to people living in Milwaukee county as it does to those living in other counties in the state, and there is no logical reason that can be advanced for making any distinction whatsoever. The distinction might as well have been based upon the subject of religion, race, or politics.

"The classification must be based on substantial and real differences in the classes, which are germane to the purpose

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of the law and reasonably suggest the propriety of substantially different legislation." *Bingham v. Milwaukee Co.* 127 Wis. 344, 347, 106 N. W. 1071. See, also, *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954.

It is plain that the provisions of sec. 1130, Stats., are designed to give all persons who are owners of lands or an interest therein the fullest opportunity of protecting themselves by information, so as to prevent a forfeiture or loss of their lands. If it is an advantage to owners of lands outside of Milwaukee county to obtain this information, then it is a decided disadvantage to owners of lands in Milwaukee county not to receive such information.

Sec. 1131*a* also violates the provisions of sec. 31, art. IV, of the constitution.

It has been held in *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 88, 70 N. W. 77, that, referring to the restrictions against special legislation for assessment or collection of taxes, it embraces all the proceedings for raising money by the exercise of the power of taxation, from the inception of the proceedings to its conclusion, and took from the legislature all jurisdiction, past, present, and future, of special legislation on the subject.

The principal object of the constitutional provisions above referred to is to prohibit special legislation, and the language used in the opinion in *Hetland v. Norman Co.* 89 Minn. 492, 495, 95 N. W. 305, 306, is apt and applicable to the situation:

"To approve [of such legislation] would [be to] open the door to all sorts of special legislation, general in form but special in fact, the only limitation to which would be the ingenuity of legislators in devising new classifications."

It will not be necessary, for the reasons above stated, to consider plaintiff's other objections to the validity of the tax deed in question.

The defendant contends that a deposit should have been

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made by the plaintiff in accordance with the provisions of secs. 1210*h* and 1210*h*—1, Stats., as a prerequisite to the maintaining of her action.

The action that forms the basis of this suit is not one of those actions contemplated by the sections of the statutes last above referred to. It is not an action to set aside a sale or to cancel the tax certificate or to restrain the issuing of any tax deed, but is an action in ejectment to recover the possession of land, which is controlled by sec. 3087, entitled "Recovery where tax title defective."

In the case of *Van Ostrand v. Cole,* 131 Wis. 446, 451, 110 N. W. 891, which was an action of ejectment, the court specifically in its decision decides defendant's contention adversely to him. In that decision it is held:

"It is further contended that plaintiff could not maintain this action unless before action he tendered defendant the full amount of all taxes, interest, and charges arising out of the sale of the premises for the nonpayment of taxes involved in the proceedings on which her tax titles are based. The argument that the failure to so tender payment of these sums would be a deprivation of defendant's right to the sum so paid for taxes, interest, and charges, on account of the owner's delinquency, and would thus deprive her of the interest acquired in the lands by such payments, is without merit, in view of the provisions of the statute providing that such purchasers shall be reimbursed the sums paid for tax certificates held by them, if the title fails on account of defects or deficiencies in the tax proceedings. Sec. 3087, Stats. 1898, makes provision for the repayment of the amounts paid for taxes, interest, and charges by holders of certificates on the land of such delinquent owner in case he establishes the right to hold the premises against the claims of such purchasers of tax certificates."

We therefore hold that defendant's tax deed is invalid for the reasons stated, and that sec. 1131*a,* Stats., is unconstitutional and in violation of the provisions of secs. 23 and 31 of art. IV of the constitution of the state.

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The lower court must compute the amount for which the real estate in question was sold and the costs of executing and recording the tax deed in question and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per cent. per annum from the time so paid until the date of the order herein referred to, pursuant to sec. 3087, Stats., and such lower court shall thereupon enter an order that the amount so computed shall be set off against the damages awarded to the plaintiff, namely, the sum of six cents; and as to the excess, that said order provide that the plaintiff, as a condition of judgment, shall pay the same, with interest from the date of such order, within ninety days; and that in default thereof the judgment of the lower court be affirmed; that upon compliance with said order upon the terms and within the time therein specified, judgment be entered in favor of the plaintiff against the defendant in accordance with this opinion.

By the Court.—It is so ordered.

GOULD, Respondent, vs. PENNSYLVANIA FIRE INSURANCE COMPANY and others, Appellants.

May 5—May 31, 1921.

Insurance: Concurrent insurance: Mortgage on property insured: Knowledge of agent: Consent implied from knowledge: Evidence: Admissions: Statement of party contrary to undisputed fact: Statute prescribing standard fire insurance policy: Effect on existing rules of law.

1. A statement by an insured to the state fire marshal investigating a fire that insured and another named person were partners, where the undisputed proof showed that insured was the sole owner of the burned goods, subject to chattel mortgage held by such named person, did not affect the validity of policies insuring the goods.

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2. Where an agent issued a fire insurance policy knowing there was to be concurrent insurance on the property, the policy was not void on the ground that it did not permit concurrent insurance, the issuance of the policy with such knowledge on the part of the agent constituting consent to concurrent insurance by the insurer.
3. Where agents knew that goods were mortgaged at the time that they consented, on behalf of the insurer, to the assignment of policies insuring the goods, the mortgaging of such goods was no defense in an action on the policy by the assignee, the knowledge of the agents being the knowledge of the insurers, and consent to the assignment with knowledge of the mortgage constituting a consent to the mortgage.
4. Knowledge of the agents was knowledge of the insurers, notwithstanding ch. 127, Laws 1917, omitting from the standard form of policy the provision as to knowledge of the agent being that of the company, since the inclusion of such provision was merely declaratory of the law as it existed and added nothing to the effect or value of the policy. Its exclusion, therefore, took nothing from the law or the effect of the policy.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover $4,700 on three insurance policies issued October 3 and 4, 1918, for the loss of $6,602.67 on a stock of goods destroyed by fire November 14, 1918. Due proof of loss was made. At the time the policies were issued the goods were owned by one Volk. The agent of the *Pennsylvania Fire Insurance Company* and of the *Hartford Fire Insurance Company,* one Johnson, secured the insurance, and pursuant to a plan between him and Pitt, the agent of the *Minneapolis Fire & Marine Insurance Company,* he gave Pitt $2,000 of the insurance. On November 4th the plaintiff bought the stock of goods from Volk, who took a chattel mortgage on the same to secure a part of the purchase price, and the policies were redelivered to Johnson, who helped plaintiff negotiate the deal with Volk. Both Johnson and Pitt knew of the existence of the chattel mortgage on the goods and both consented

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in writing to the assignment of the policies to plaintiff. On November 6th, at the request of Johnson, plaintiff paid the premium on each of the policies to Johnson, who turned over to Pitt the amount of the premium on the policy issued by him.

The defendants claimed that the policies were void because of false swearing by plaintiff as to the ownership of the goods and because a chattel mortgage was placed on them after the policies were issued, and the *Minneapolis Fire & Marine Insurance Company* claims its policy was void because it did not permit concurrent insurance.

The court held the policies valid and rendered judgment in favor of plaintiff, from which judgment the defendants appealed.

Thos. H. Gill of Milwaukee, for the appellants.

For the respondent there was a brief by *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, and oral argument by *John F. Kluwin.*

VINJE, J. The claim that the policies were void because of false swearing as to ownership of goods was disposed of adversely to the defendants by the trial court because the evidence did not sustain it. There was some testimony to the effect that plaintiff had told the state fire marshal who had investigated the case that he and Volk were partners. The trial court properly found such statement was not made. Even if it had been it could not have affected the validity of the policies, because the undisputed proof showed that plaintiff was the sole owner subject to the chattel mortgage.

The trial court correctly held that the return of the policies to Johnson and their redelivery to plaintiff, who paid the premium, with the companies' consent in writing to their assignment to him with knowledge by the agents of all the material facts affecting the insurance, was equivalent

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to a new issuance of the policies to him, and the defendants could not defeat them on the ground that there had been a change in the insured property subsequent to the issuance of the policies not consented to or known by the defendants.

The agent Pitt, at the time he issued the policy, knew there was to be concurrent insurance on the insured property. Having such knowledge, the issuance of the policy was equivalent to a consent to concurrent insurance by the company. *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227. It was there held that

"If, when the agent of an insurance company delivers a policy of insurance, he has knowledge of the facts as regards the subject of the insurance inconsistent with the terms of the policy, the assurer, by accepting the premium, is estopped from declaring the policy void because the terms thereof were not so changed in writing as to conform to the facts."

The same principle applies to the chattel mortgage. Both agents knew that the goods were mortgaged when the policies were assigned to plaintiff. Knowledge on their part was knowledge on the part of the defendants. *Stilp v. New York L. Ins. Co.* 168 Wis. 264, 169 N. W. 606. This, however, the defendants deny, claiming that the judicial rule of the state as declared in the *Welch Case* was changed by the adoption of ch. 127, Laws 1917, in force when the policies were written, which leaves out of the standard form of insurance policy the clause that knowledge of the agent is knowledge of the company. A judicial rule of long standing and founded upon just and equitable principles is not abrogated by an omission in a prescribed form of policy. Its inclusion therein was merely declaratory of the law as it existed and added nothing to the effect or value of the policy. Its exclusion, therefore, took nothing from the law or the effect of the policy. The judicial rule remained unchanged by the legislative action.

By the Court.—Judgment affirmed.

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HOPFENSPERGER, Respondent, vs. BRUEHL and others, Appellants.

May 6—May 31, 1921.

Statute of frauds: Contract to sell lands and personalty: Supplementary oral agreement: Part performance: Delivery of possession: Specific performance.

1. Where a written contract for the sale of a farm and personal property contained all the essential terms required in law, except that the time of payment of the purchase price and the rate of interest were not specifically embodied, and a subsequent definite oral agreement as to such matters was made which was in no way contradictory of but supplementary to the written agreement, which indicated on its face that it did not contain the entire transaction of the parties respecting the subject of the contract, it is no legal objection that the contract was in part in parol.
2. Under such circumstances there was a substantial part performance of the contract, where the seller let plaintiff into possession of the entire farm except the house, and of all the personal property, plaintiff's son boarding with defendant and taking care of the stock and working on the farm, and everything appearing to be harmonious until the seller concluded to repudiate the contract; and the court properly decreed specific performance of the contract under sec. 2305, Stats.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The action was commenced as a replevin action, but was tried as an action for specific performance of a land contract alleged to have been executed and delivered by the defendants *Ernst* and *Emma Mayer,* whereby they agreed to sell and convey to plaintiff *Hopfensperger* certain lands and premises located in Calumet county.

The court found that *Mayer* sold his farm and stock and tools to the plaintiff for a fair and adequate consideration after due consideration and deliberation and that he and his wife signed a written contract to that effect on April 8, 1919; that the contract called for the payment of interest

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but did not specify the rate; that on April 22, 1919, it was orally agreed between plaintiff and defendants that *Ernst Mayer* could keep the chickens, would have the right to remain in the house until on or about September, 1919, and could have wood for household use and a daily allowance of milk while he should remain in the house, and a garden patch; that on this day it was also agreed that the rate of interest should be five per cent. and the mortgage should run for five years, the interest to begin on May 20, 1919; that the plaintiff went into peaceable possession of the premises and the personal property, except the dwelling house and garden patch, on April 28, 1919, with the consent of the defendant *Ernst Mayer;* that on or about May 12, 1919, *Ernst Mayer* concluded to repudiate the contract and placed every obstacle in the way of plaintiff's enjoyment of the premises, nailing up gates and doors to prevent the plaintiff from using them, interfering with his milking of cows, and taking away his team of horses, harness, and wagon from the premises; that these acts of trespass continued until this action was brought to restrain him; that the subsequent oral agreement did not materially change the contract, but only made more definite and certain the time of payment which the court could have fixed, and that no change of contract was needed to enforce it as to the wife, her signing of the original contract having been a full compliance with the statute in that respect; that the personal property was fully described in the contract; that *Ernst Mayer* absolutely repudiated the contract on or about May 12, 1919, hiding himself in order to avoid tender of the money and note, which were duly tendered on May 21, 1919; that the defense of fraud and intoxication, set up in answer, has been abandoned by defendants; that plaintiff abandons any and all claim for personal service as agreed to under the contract for the painting of the house and putting a new roof thereon.

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The court also found that the contract provided that when the sum of $13,000, with interest, shall be fully paid and in the time and manner above specified, the defendants shall execute and deliver to the plaintiff a deed; that a cash payment of $3,000 was payable on May 20, 1919, on which day the plaintiff tried to pay the same, and that he also had prepared to tender for delivery a note for $3,475, payable July 1, 1919, with interest at five per cent., and a note for $6,500, with interest at five per cent., payable five years after date and secured by a mortgage bearing even date therewith, which cash, notes, and mortgage could not be delivered because defendant *Mayer* hid himself and could not be found; that the cash, notes, and mortgage were duly deposited at the Bank of Menasha for the defendant *Ernst Mayer* and he was notified that said moneys and securities were at the bank for him; that *Ernst Mayer* and his wife refused, upon the due tender of the notes and securities, to execute and deliver to the plaintiff the deed of said premises and property as agreed in the contract; that upon the trial of the action the defendants contended that the complaint included an action for specific performance, which contention was conceded by plaintiff's attorneys, who introduced testimony on behalf of the plaintiff with reference to the contract which took place on April 22, 1919. The court held that the plaintiff *Hopfensperger* shall deposit with the clerk of the circuit court for Calumet county the sum of $3,000, which was due and payable May 20, 1919, and which on that day had been duly tendered to defendant *Ernst Mayer* and refused by him, and also deposit with the clerk of said court the sum of $3,475, with interest as provided in the note, and further deposit with the clerk of the circuit court for Calumet county the note executed by him on May 20, 1919, for $6,500, at five per cent. interest, secured by a real-estate mortgage on the premises described in the contract; that

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the plaintiff, *William A. Hopfensperger,* is entitled to the deed of the premises described in the contract and the possession of all the personal property described therein; that plaintiff's damages because of the unlawful taking and retention of his personal property are assessed at $50.

Judgment was entered in accordance with the findings, from which judgment defendants appeal.

For the appellants there was a brief by *George C. Hume* of Chilton, and oral argument by *E. G. Nash* of Manitowoc.

L. P. Fox and *J. E. McMullen,* both of Chilton, for the respondent.

SIEBECKER, C. J. The action was brought to replevy personal property from defendants which the plaintiff claims he purchased from the defendant *Mayer* under a written contract between himself and *Mayer* and his wife on April 19, 1919, whereby the *Mayers* sold to plaintiff their farm and the personal property specifically described in the contract. When the action was called for trial the parties agreed that the issues raised by the pleadings included the issue for specific performance of the contract, and a trial was had before the court for determination of such equitable issue. Upon the evidence adduced the court made findings of fact as stated above. It is well established, as the court found, that the plaintiff and defendants, neighbors, met on the following 22d day of April, after the written contract had been signed, to further consider matters pertaining to the transaction, and that it was then mutually understood and agreed that the *Mayers* should have the right to occupy the house on the premises until the following September, keep the chickens, have the right to firewood and the use of a garden patch and a daily allowance of milk; that plaintiff should pay five per cent. interest on the unpaid purchase money from May 20th until the time of payment, and that the note and

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mortgage for part of the purchase money should be due in five years. Under the agreements so made in writing and by parol the plaintiff was given the possession of the farm on April 28th and of all the personal property so purchased by him. Thereafter the plaintiff cultivated the farm and had charge of this personal property without interference by the defendants until the 12th day of May following, when the defendants *Ernst Mayer* and wife undertook to repudiate the contract of sale of the farm and personal property by the attempted trespass found by the court and the removal of some of the personal property from the premises, which obstruction continued up to the time this action was commenced. It is clear that the parties intended to consummate a purchase and sale of the farm and personal property in question and that the written contract embraced all of the agreements respecting the same, except that the time for payment of the unpaid purchase money and the interest it should bear were not inserted. It is contended by appellants that parol evidence of the agreements respecting time of payment and interest cannot be considered because under the provisions of sec. 2302, Stats., they must be in writing. It is manifest that the agreements of the parties made on April 22d do not contradict or vary the agreements of the writing made April 18th. They add definite terms to those contained in the writing on the same subject, and make additional arrangements respecting the occupancy of the house, retaining chickens, using firewood and garden patch and the furnishing of milk. The situation on April 22d was that there was a written contract between the parties for the sale of the farm and the specified personal property, containing all the essential terms required in law except that the time of payment of the consideration and the interest thereon were not specifically embodied, which were, however, definitely agreed upon orally thereafter as a part of

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the transaction. It is plain that the writing and parol agreement express the entire transaction and that they are in no way contradictory but that they are supplementary. Under the circumstances, the terms of the writing and parol arrangements constitute the contract of the parties upon which possession of the farm and personal property was delivered to plaintiff on the 28th day of April following. There is no legal objection that the contract is in part in parol, since the writing on its face indicates that it does not contain the entire transaction of the parties respecting the subject of the contract. *Cuddy v. Foreman,* 107 Wis. 519, 83 N. W. 1103; *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418.

It must be borne in mind that the wife signed the written contract for the sale of the farm and acquiesced in the parol stipulations regarding the payment of interest and the term of the note and mortgages. Under these circumstances of the transactions it appears, as held by the trial court, that

"The defendant let the plaintiff into possession of the farm (all but the house) and of all the personal property. The plaintiff's son boarded with *Mayer,* took care of the stock and worked on the farm, and the latter assisted him more or less. Everything appears to have been harmonious until about the 12th of May. *Mayer,* then, for reasons best known to himself, concluded to repudiate the contract, and placed every obstacle in the way of plaintiff's enjoyment of the premises."

Manifestly the plaintiff was in complete possession of all of the property he bought from *Mayer* in fulfilment of the contract of sale. The plaintiff's possession of the property with defendants' consent constituted such a substantial part performance of a valid contract for the sale of real and personal property that repudiation thereof by defendant *Mayer* would operate inequitably against the plaintiff and to his great damage. Under such circumstances specific

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performance of the contract of sale was properly awarded by the trial court under the provisions of sec. 2305, Stats. *Booher v. Slathar,* 167 Wis. 196, 167 N. W. 261, and cases there cited.

We discover no indefiniteness in the description of the personal property transferred by the terms of the written contract as supplemented by the parol agreements as above indicated. It is considered that the trial court properly awarded judgment for specific performance of the contract of the parties.

By the Court.—The judgment appealed from is affirmed.

ESTATE OF ECKER: KLEIBER, Appellant, vs. ECKER, Respondent.

May 6—May 31, 1921.

Bastards: Evidence as to parentage: Sufficiency: Acknowledgment in writing: Form: Purpose.

1. Evidence that the contestant in administration proceedings was received by the intestate as a son and lived as a member of his family until marriage, and afterwards resided in the same neighborhood, the relationship which would naturally exist between a father and an adult son continuing until the death of the intestate, is *held* to establish that he was intestate's son though never formally adopted or acknowledged as such.
2. Under sec. 2274, Stats., providing that every illegitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, acknowledge himself to be the father of such child, a contract properly witnessed, entered into jointly by intestate and contestant, who claimed to be his only heir at law, with one S., stating that intestate "and son" were purchasers from S., and a certain order written by intestate directing a saloonkeeper to "give my son," naming contestant, a keg of beer, constituted sufficient acknowledgment by the intestate that he was the father of contestant, though the writings were not made for the purpose of establishing his heirship or of complying with the statute. *Richmond v. Taylor,* 151 Wis. 633, followed.

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APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Joseph Ecker died intestate April 30, 1918, his wife having died some years before. He left surviving his sister, the appellant, and several children of a deceased brother. There were no children as a result of his marriage.

It appears that in 1866 one Mary Halda made a complaint before a justice of the peace in which she charged that the deceased, Joseph Ecker, was the father of her unborn child. A warrant was issued. Subsequently Mary Halda gave birth to a male child and named him *Adolph Ecker,* by which name he has ever since gone. Soon after the birth of *Adolph,* Mary Halda married one Frank Steinfest, leaving the child *Adolph* with her parents, where he remained until he was four years of age. The maternal grandparents then took *Adolph* to the residence of Joseph Ecker, who in the meantime had married, and *Adolph* thereafter remained as a member of the family of Joseph Ecker and was in all respects treated by Joseph Ecker as his son. *Adolph* subsequently married a daughter of a neighboring farmer and ever since his marriage has resided in the neighborhood where Joseph Ecker lived. Joseph Ecker was never adjudged the father of *Adolph,* and Joseph never adopted *Adolph* in the manner prescribed by statute.

Upon the death of Joseph Ecker, *Adolph Ecker* made a petition to the county court of Manitowoc county for the administration of the estate of Joseph Ecker, alleging that he was the only heir at law of the deceased, and shortly thereafter *Elizabeth Kleiber,* the appellant, petitioned the county court for administration of the estate of Joseph Ecker and alleged that she was one of the heirs at law and the only surviving sister of Joseph Ecker. The case was tried in the county court and judgment was entered in favor of *Adolph.* An appeal was then taken to the circuit court, where the case was tried before the court without a

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jury, and the circuit court also found in favor of *Adolph,* and from the judgment entered *Elizabeth Kleiber,* the sister, appeals.

For the appellant there was a brief by *E. S. Schmitz* of Manitowoc, attorney, and *Schmitz, Wild & Gross* of Milwaukee, of counsel; and the cause was argued orally by *A. J. Schmitz.*

For the respondent there was a brief by *Hougen, Brady & Meyer* of Manitowoc, and oral argument by *A. L. Hougen.*

ROSENBERRY, J. While the finding of the court that *Adolph Ecker* is the son of Joseph Ecker is assigned as error by the appellant, that fact is so conclusively established that it may be treated as a verity in this case. In every possible way over a long period of time, with the single exception of formally adopting him or acknowledging him as his son by some formal document, Joseph Ecker treated *Adolph* as his son. *Adolph* was born January 2, 1866, so that the witnesses to the transactions which occurred at the time *Adolph* became a member of the family of Joseph have passed away with the exception of Mary Halda, the mother, who appeared at the trial and testified in behalf of *Adolph. Adolph* was received as a son, lived as a member of the family of Joseph Ecker until his marriage, and thereafter the relationship which would naturally exist between a father and an adult son continued down to the time of the death of Joseph. The decisive question in this case is, Did Joseph Ecker acknowledge himself to be the father of *Adolph Ecker* so as to entitle *Adolph* to the benefit of the provisions of sec. 2274, Stats.?

"Every illegitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child."

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The evidence to sustain the finding upon this branch of the case was practically without dispute, and the question is, Did the writings amount to a compliance with the statute? The court found:

"8. That about twenty years before the time of this trial said Joseph Ecker and his son *Adolph Ecker* entered into a written contract with one F. F. Stelling for the purchase from said Stelling of a threshing machine; that in the body of that contract it was stated that Joseph Ecker and son were the purchasers of the machine. That the contract was signed by said Joseph Ecker and *Adolph Ecker* and said F. F. Stelling; that the said contract in writing was signed by the said Joseph Ecker and *Adolph Ecker* in the presence of said F. F. Stelling and that he, F. F. Stelling, was a competent witness thereto. That said written contract has since been lost, and after due search could not be found to be produced at the trial.

"9. That while the said *Adolph Ecker* was a boy and was living with said Joseph Ecker, said Joseph Ecker on frequent occasions wrote out a slip of paper, an order addressed to a saloonkeeper at Brillion, to deliver a keg of beer to said *Adolph* for said Joseph Ecker. These orders *Adolph* took to the saloonkeeper and procured the beer. On some of these occasions said *Adolph Ecker* was accompanied by Fred Wolfe and at other times by John Schreiber. One of these orders for beer was written by the said Joseph Ecker in the presence of said Fred Wolfe; others of these orders were written by said Joseph Ecker in the presence of said John Schreiber. Said Fred Wolfe and said John Schreiber were competent witnesses. Said orders were written by said Joseph Ecker in the German language; one of them was read by said Schreiber and its meaning in the English language is, 'Give my son *Adolph* a keg of beer on my name. Joseph Ecker.' That order was signed by Joseph Ecker in the presence of said John Schreiber, and he was a competent witness thereto."

The trial court held that these writings constituted a sufficient acknowledgment on the part of Joseph Ecker that he was the father of *Adolph* and that *Adolph* thereby

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became entitled to inherit in accordance with the provisions of sec. 2274.

The provisions of sec. 2274 were quite fully discussed in *Richmond v. Taylor,* 151 Wis. 633, 139 N. W. 435. It is there stated:

"It is not essential that the written acknowledgment shall be made for the express purpose of establishing heirship or of a compliance with the statute. It may be made in entire ignorance of the statutory requirements and for purposes other than that of creating heirship. . . . It does not require that the witness should attest or subscribe the writing or acknowledgment—only that the person making it shall sign in the presence of the witness. . . . Neither does it require that the acknowledgment of paternity shall be in precise formal language. It is sufficient if it appear with reasonable clearness and certainty from the written words that the paternity of the child is acknowledged."

It is considered that the trial court correctly held that the writings referred to in the findings were a sufficient acknowledgment. Our attention has been called to many cases in other jurisdictions where conclusions have been reached which are at variance with those reached in the case of *Richmond v. Taylor.* We see no reason, however, for disturbing the ruling made in that case.

Other questions are raised and discussed in briefs of counsel, but in view of the result which we have reached we see no reason for further discussion.

By the Court.—Judgment affirmed.

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BECK, Appellant, vs. SIEMERS, Respondent.

May 6—May 31, 1921.

Master and servant: Injury to domestic servant: Unguarded machinery: Safe place to work: Assumption of risk: Contributory negligence: Evidence: Sufficiency.

1. In an action by a servant for personal injuries it is not a defense that the employee assumed the risk of the employment, where the relation of the parties was such that it was the duty of the defendant, under sec. 2394—48, Stats., to furnish the plaintiff a safe place to work, where plaintiff was not engaged in labor upon defendant's farm but in private domestic service which involved the use of mechanical power within the meaning of sec. 2394—41; but the defense of contributory negligence remains.
2. In such case, a finding of the jury that plaintiff was guilty of contributory negligence is not supported by testimony which was only such as showed assumption of risk.
3. In such case, merely continuing in an employment and doing work as intended by the employer and the employee in the usual and ordinary manner, although the place of work is unsafe, does not constitute contributory negligence.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for damages for personal injuries. Trial before a jury resulted in judgment upon a special verdict dismissing the complaint. Plaintiff appeals.

On February 18, 1918, the date of the accident, appellant was engaged in the household of respondent as a domestic servant, and had been so engaged for some two years. Respondent was a farmer, and appellant's work consisted of helping respondent's wife with the usual work about the farm house, and of helping with the milking, in the garden, and occasionally in the fields.

At the time of the accident appellant and respondent's wife were doing the washing in the basement of the house, as they had done many times before. From the part of

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the basement in which the washing was done a doorway led into another part of the basement. As one approached this doorway there was a small gasoline engine on the left, and, at the time of the accident and for a part of each year, a boiler kettle upon a small stove on the right. The passageway leading to the door between the engine on the one side and the boiler and stove on the other was about two feet wide. On the wall above the boiler, about eighteen inches to the right of the doorway and five and one-half feet above the floor, was kept a wringer hanging on a nail. The wringer weighed about ten pounds. The only way of getting to it was by the said passageway.

The engine was used to drive a generator to furnish light for the farm, to run the washing machine, and for other purposes. It had a large fly-wheel on either side, and at the center, or hub, of the wheel towards the passageway was an arrangement of springs and weights to serve as a governor. The engine ran at a speed of about 500 revolutions per minute.

When the washing was being done the engine was almost invariably running, and appellant knew that it was running at the time of the accident. Respondent or his wife usually took entire charge of the engine; appellant had little or nothing to do with it. It was part of appellant's duty, however, to wring out the clothes, and for this purpose she customarily went through the passageway past the running engine, reached down the wringer, and returned with it. She testified that she did not remember whether she had done it before the day of the accident at a time when the boiler and stove were in position, but it seems probable from the undisputed facts that she had.

On the day of the accident appellant was directed by respondent's wife to get the wringer and start that part of the work. She went to it as usual, lifted it off the nail, and was turning back when her clothes caught in the fly-wheel

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or governor of the engine and she was thrown to the floor receiving serious injuries. Appellant testified that she did not look at the engine as she went past it or as she reached for the wringer, although she knew it was running; she looked only at the wringer; that she gave no thought to any danger of the engine injuring her; and that as she turned after having reached down the wringer, at the time she was thrown, she turned to the right facing the boiler. There was no fire in the stove under the boiler. The basement was well lighted.

The jury by their verdict found that the place of employment was not as safe as the nature of the employment and use of the engine reasonably permitted; that it was reasonably practicable to have provided such safety devices as would have been reasonably adequate to render the place safe; that the failure to provide such devices was the proximate cause of the injury; by the sixth question, in effect, that there was contributory negligence; and that the damages were $4,060.

Appellant made the usual motions, and excepted to a portion of the charge of the court upon contributory negligence upon the ground that the question of assumption of risk as distinguished from contributory negligence was not called to the attention of the jury. Appellant's motions were denied, and judgment was entered upon the verdict in favor of respondent dismissing the complaint, with costs.

For the appellant there was a brief by *Bowler & Bowler* of Sheboygan and *A. L. Hougen* of Manitowoc, and oral argument by *T. M. Bowler.*

For the respondent there was a brief by *Nash, Nash & Ledvina* of Manitowoc, and oral argument by *E. G. Nash.*

JONES, J. It is conceded that the relations of the parties were such that it was the duty of defendants to furnish the plaintiff a safe place to work and to furnish such safety

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devices and safeguards as are provided by sec. 2394—48, Stats. It is also conceded that the plaintiff was not engaged in farm labor, but was engaged in private domestic service which involved the use of mechanical power within the meaning of sec. 2394—41. It follows from this that under the statute first above cited it was no defense that the employee may have assumed the risk of the employment. It is too well settled to require discussion that although the statute in such cases deprives the employer of the defense of assumption of risk, that of contributory negligence remains. *Puza v. C. Hennecke Co.* 158 Wis. 482, 149 N. W. 223; *Fandek v. Barnett & Record Co.* 161 Wis. 55, 150 N. W. 537.

It is established by the undisputed testimony and the verdict that the place of employment was not reasonably safe; that it was practicable for defendant to use such safety devices as to render the place of employment safe without preventing the practical operation of the machine; that such safety devices were not provided, and that the failure to provide them was the proximate cause of the injury. These are issues which are usually warmly contested in cases of this character, but in their absence the only questions before us are whether the issue of contributory negligence was properly submitted on instructions to the jury, and whether there was any evidence to sustain the verdict of the jury as to contributory negligence.

It is strongly urged by respondent's counsel that contributory negligence was shown by the testimony of the plaintiff to the effect that she was not looking at the wheel and was only looking at the wringer when the accident happened. It is claimed that if she had gathered her skirts in her hands and looked more carefully the accident would not have happened.

In considering these arguments certain other facts are to be borne in mind. Unlike some other cases under these

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statutes where contributory negligence has been discussed, the plaintiff can be charged with no negligence in creating the conditions under which she worked. Her employers alone were responsible for those conditions. She had not been warned of any danger. It is argued that the danger was perfectly obvious and that ordinary care required her to take notice of it. But she and her mistress had often done the same work, and, so far as the testimony shows, in the same manner, without any resulting injury of which she had knowledge.

The injury was closely connected with the act of reaching for and taking down the wringer, when most of the time her gaze was in a different direction from the engine. In obeying the directions of her mistress she was required to pass near the engine, a dangerous machine when unguarded, and yet the testimony shows that she was unaware of the danger in doing her work in the manner she did. A brother of defendant testified that the fly-wheel, running at 500 revolutions per minute, would create considerable suction, and that if a woman of the size of plaintiff stood between the fly-wheel and the kettle there would be some danger of her skirts being drawn into the fly-wheel by the suction, depending on how she stood.

The defendant's wife testified that the first summer they had the engine she walked so close to it that she was drawn close in and it caught her, but she grabbed her skirts loose; that she told her husband of it. It does not appear that plaintiff had been informed of this fact or of any other which would tend to put her on her guard. In this tendency of the machine was a hidden danger not likely to be appreciated by one unacquainted with machinery and not understood by plaintiff, and it is not at all unlikely that it was the cause of the injury.

We are convinced by the testimony that plaintiff was doing her work in the usual and customary manner, under the

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direction of her employer, and in a place where there were dangers known to her employer but of which she was wholly ignorant. In order to establish contributory negligence the burden of proof was upon the defendant. After giving careful attention to the evidence and to the able decision of the trial court, we feel obliged to differ from him and to hold that the burden has not been met, and that there was no evidence on which to base the answer of the jury to question 6 finding that the plaintiff was guilty of contributory negligence. The testimony relied upon on that issue was only such evidence as showed assumption of risk, which was not a defense. We come to this conclusion less reluctantly because in the instructions there was nothing to inform the jury that continuing to work in proximity to a dangerous machine was not of itself contributory negligence.

In the case of *Puza v. C. Hennecke Co.* 158 Wis. 482, 149 N. W. 223, Mr. Justice TIMLIN said:

"It is quite safe to say that an intended and continued use of a known defective appliance or a known unsafe place by the employee in substantially the same way as the employer instructed or intended it should be used, falls under the definition of assumption of risk as expressed in this statute and is not to be considered contributory negligence."

If the action had been brought before the enactment of the statutes above cited it would have been a proper question for the consideration of the jury whether plaintiff had assumed the risk. Although the defense has been abolished, and although it is no longer necessary to submit to the jury the question of assumption of risk, it would seem best in cases of this character to instruct the jury that merely continuing in an employment and doing work as intended by the employer and the employee in the usual and ordinary manner, although the place of work or appliance is unsafe, does not constitute contributory negligence. In view of the facts in this case, if such an instruction had been given it is quite probable that the answer of the jury to question 6

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might have been different. But no such instruction was requested and we do not base our decision on that ground.

By the Court.—The judgment is reversed, and the cause is remanded with directions that the answer to question 6 be changed from Yes to No and that judgment be entered for the plaintiff for the amount of damages assessed by the jury.

BECKER and wife, Respondents, vs. SPALINGER and wife, Appellants.

May 6—May 31, 1921.

Principal and agent: Agent accepting secret commission from adverse party: Fraud: Rescission of transaction: False representations: Statements as to value.

1. Where plaintiff sought the advice of the manager of a trust company, who was an attorney, as to the advisability of purchasing a certain farm, and while acting as agent for plaintiff the manager advised against a purchase which plaintiff was considering and called attention to and recommended the purchase of defendant's farm, hurried along its inspection, and said nothing regarding an abstract of title, and during all this time he was, without plaintiff's knowledge, in reality agent for the defendant, the failure to disclose the true relationship existing between the manager and the defendant constituted a fraud on plaintiff warranting the annulment of a contract of exchange of lands between him and defendant.
2. Having been hired as plaintiff's agent it was the duty of the attorney to advise him with respect to the transaction in question and to bring home to plaintiff knowledge of his engagement as an agent for compensation on the part of defendant, and, having failed to do so, he was guilty of disloyalty toward the plaintiff entitling plaintiff to rescind the entire transaction.
3. A representation by one making an exchange of lands that he had been offered $7,000 for his property, if false, constituted a fraud warranting rescission.

APPEAL from a judgment of the circuit court for Sheboygan county: CHESTER A. FOWLER, Judge. *Affirmed.*

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Ernst Becker and *Lena Becker,* his wife, plaintiffs, on the 8th day of May, 1918, were the owners in fee of the north half of lots 1 and 2 in block 18 of Swift's addition in the city of Sheboygan, in Sheboygan county, Wisconsin, which real estate was incumbered by a mortgage in the sum of $1,741.

On said day the defendant *Jacob Spalinger* was the owner in fee of the north half of the northwest quarter of section 10, township 14, range 20, in Sheboygan county, Wisconsin, which said real estate was incumbered by a mortgage in the sum of $2,000.

There was situated on plaintiffs' real estate a two-story dwelling house, occupied in part by plaintiffs as a homestead. The farm of defendants consisted of a rocky, stony, hilly piece of land, of which not to exceed fifteen acres had been cultivated or was subject to cultivation.

Plaintiff *Ernst Becker* is about thirty years of age, and for a period of about five years prior to May, 1918, was employed as a motorman and conductor for the street-car company at Sheboygan, Wisconsin. Neither he nor his wife had had any experience in farming, and were not familiar with the value of farm lands, either in Sheboygan county or elsewhere.

A few days prior to the 8th day of May, 1918, plaintiffs called upon one Otto Bassuener, a resident of the city of Sheboygan, a lawyer and the manager of the Sheboygan Mortgage & Trust Company, for the purpose of taking him with them to a farm in the neighborhood of Antigo, Wisconsin, so that he might advise them with respect to the value of a certain farm and the suitability of such farm for farming purposes. The trip to Antigo and vicinity was undertaken, the farm inspected, and plaintiffs were advised by Bassuener against investing in a farm in that locality, and that they could purchase a farm in Sheboygan county

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which was considerably better. Plaintiffs paid Bassuener for making this trip to Antigo with them.

The next morning Bassuener called upon plaintiffs with an automobile and took them to the farm of the defendant *Spalinger* in the town of Mitchell in Sheboygan county. The plaintiffs, together with Bassuener, then spent about twenty-five to thirty minutes upon *Spalinger's* farm, viewing but a small portion of it, and also making some examination as to the condition of the house and the barn upon the farm. Bassuener, on the occasion of that visit, made the statement that he was in a hurry to get back; that he had a lot of work on hand.

After this short visit to the farm Bassuener took plaintiffs in his automobile to the farm that *Spalinger* then occupied and which was located a short distance from the farm in question. The parties were there introduced and had supper, and arrangements were then made for the parties to meet in the city of Sheboygan on the following morning so that an agreement for exchange of properties could be entered into and perfected.

The following morning *Spalinger* and his wife arrived at plaintiffs' residence in the city of Sheboygan and there the proposed exchange was discussed. On that occasion *Spalinger* stated to plaintiffs that he wanted $7,000 for his farm; that it was worth $7,000; and that he had been offered $7,000 for the farm, and that he could get that amount for it any time. There was some discussion also with respect to the value of plaintiffs' property, *Ernst Becker* claiming that it was worth $3,000 in cash, and that it ought to bring $4,000 in a trade.

The plaintiffs relied upon the representations made by the defendant *Jacob Spalinger* with respect to the value of the farm and the offer which he claimed he had received for the same. Plaintiffs also called defendants' attention to

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the fact that there were certain outstanding and unpaid special assessments on their property, amounting to somewhere in the neighborhood of $200.

On the same day the parties met at the office of Mr. Bassuener, in Sheboygan, and there the papers were made for the exchange of the properties.

The testimony shows that the plaintiffs' house and lots in Sheboygan were worth $3,000, and that the same were incumbered by mortgage for $1,740, and that, excluding taxes, the equity of plaintiffs in the house and lots was worth about $1,250.

The testimony shows that the defendant *Jacob Spalinger's* farm was worth not to exceed $1,500, and that only fifteen acres of such land were capable of cultivation, and that the land was incumbered by a mortgage in the sum of $2,000.

At Bassuener's office the parties entered into and executed a land contract for the exchange of their properties, by which the plaintiffs agreed to pay to the defendants, in addition to conveying their property, the sum of $5,000. The plaintiffs executed a quitclaim deed of their property to the defendant *Jacob Spalinger,* subject to the mortgage of $1,740, so that the defendant *Jacob Spalinger* received an equity of about $1,250, and in addition thereto was to receive the sum of $5,000 as aforesaid.

Prior to the time that the plaintiffs and Bassuener took the trip to Antigo the defendant *Jacob Spalinger* had requested Bassuener to secure a purchaser for the eighty-acre farm in question and agreed at the time to pay him for his services, and after the consummation of the exchange of properties herein referred to, in compliance with such agreement, the said defendant *Jacob Spalinger* paid to the said Bassuener for his services in procuring a purchaser for said farm the sum of $80. The plaintiffs at no time were informed of this arrangement between the defendant *Jacob Spalinger* and Bassuener nor of the payment of such commission.

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It was also found by the court, and the testimony shows, that some personal property passed in the deal, for about $450 extra, but that the defendant *Jacob Spalinger* took a chattel mortgage on this, and in the following January took the property on the mortgage, deeming himself insecure, he buying in the property himself on the sale for less than the mortgage, and failing to account to the plaintiffs for the sale and filing no report of sale.

The trial court found, among other things, and such findings are fully supported by the evidence, as follows, to wit:

(a) That to induce said trade the defendant *Jacob Spalinger,* with intent to defraud, falsely represented his farm to be worth $7,000; that said statement was not meant as one of opinion, but was meant to be taken and was understood by the plaintiffs as one of fact, and was believed and relied on by them as such.

(b) That the plaintiffs at the time had no knowledge of farming or farm lands, were ignorant of the value of lands like defendants'; and that they were simple, inexperienced, credulous, unsuspicious, and confiding people.

(c) That the plaintiffs went upon the land of defendants and examined it as much as they wished, and took no means or pains to ascertain the truthfulness of statements of value made.

(d) That plaintiffs, after the said exchange of properties had been perfected, went into possession of the farm and remained in possession of said farm until January, 1919, when they abandoned the same.

(e) That defendants took possession of plaintiffs' property in the city of Sheboygan on or about May 8, 1918, and have since that time collected the rentals thereof.

(f) That the sum collected for rentals by the defendants amounts to $450; that defendants have paid out in taxes $278.63; in reduction of the mortgage and interest the sum of $477.39; for repairs the sum of $24.60; for improvements $76.65; insurance and water tax $28.76; and that the total

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value of the use of defendants' farm during the period that plaintiffs occupied the same amounts to the sum of $60; and that from the foregoing figures there is a balance due to the defendant *Jacob Spalinger* in the sum of $496.03.

(g) That in October, 1918, the plaintiffs tendered to the defendant *Jacob Spalinger* a quitclaim deed of the eighty acres and demanded of him a reconveyance of their said property in the city of Sheboygan, at the same time presenting to him a proper deed of conveyance for execution, and at the same time notified the said *Spalinger* that they rescinded the said exchange of properties.

(h) That the said *Spalinger* refused to comply with the requests and demands of the said plaintiffs.

As conclusions of law the court found that upon plaintiffs' delivering into court for defendants their said deed tendered to them and upon the payment into court of the sum of $496.03, less the taxable costs and disbursements of the action, within sixty days from the date of such findings, the plaintiffs be entitled to judgment declaring void and annulling the said contract of exchange and the said deed from plaintiffs to the defendant *Jacob Spalinger,* and canceling the same of record, and to the restoration of plaintiffs' premises.

Judgment was thereupon entered in accordance with said findings, from which judgment defendants appealed.

The cause was submitted for the appellants on the brief of *Francis Williams* of Sheboygan, and for the respondents on that of *M. C. Mead* of Plymouth.

DOERFLER, J. The question involved in this case is whether a fraud was perpetrated by the defendant *Jacob Spalinger* at the time the exchange of properties in question was made. Bassuener was a lawyer and the manager of the Sheboygan Mortgage & Trust Company. The plaintiffs sought his advice as to the advisability of purchasing the farm in the vicinity of Antigo. His services were secured

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and paid for, and he thereby became and was constituted the agent of the plaintiffs.

While on the trip to Antigo, Bassuener, while acting as the agent for the plaintiffs, called attention to and recommended the purchase of the eighty-acre farm in question. Pursuant to arrangements previously made, on the day following the return of the parties from their Antigo trip Bassuener called upon them with his automobile and took them to the farm and was present while such farm was inspected.

The plaintiffs at all times had good reason to believe that Bassuener was acting as their agent in this matter. While at the farm Bassuener hurried along the inspection and confined the same to a period of about half an hour, claiming that he was very busily engaged in important work which required his attention.

The parties met on the following day at Bassuener's office and the exchange papers were drafted and executed. It does not appear in the evidence that anything whatsoever was said regarding an abstract of title to the Sheboygan property. Bassuener, as a real-estate agent and an attorney, was presumed to know the usual practice in transactions of that kind with respect to examination and delivery of an abstract of title.

The matter of outstanding and unpaid special assessments on the Sheboygan property was discussed, but neither the defendant *Jacob Spalinger* nor his agent, Bassuener, ever suggested the ascertaining of the exact amount of these outstanding and unpaid assessments, notwithstanding the fact that the information was available at the office of the city treasurer in the city of Sheboygan.

Notwithstanding the fact that Bassuener led the plaintiffs to believe that he was acting in their behalf and in their interests as their agent, Bassuener during all these transactions had been hired for a compensation to act as the agent

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for the defendant *Jacob Spalinger,* and at no time did the defendant *Jacob Spalinger,* or Bassuener, notify the plaintiffs that he, Bassuener, was acting as the agent of the defendant *Jacob Spalinger* in the sale of this farm.

The conduct of Bassuener during the time the farm was inspected, in itself constitutes a rather insignificant incident, but becomes significant in connection with all the other facts and circumstances in the case. It becomes important when we consider his failure and the failure of *Jacob Spalinger* to require an abstract of the property, or with respect to the precise amount of the outstanding special assessments. These facts, together with the relationship that existed between *Jacob Spalinger* and Bassuener, and which relationship at no time was divulged to the plaintiffs, constitute fraud, which in itself is amply sufficient to warrant the judgment of the lower court.

"It is the established law that the acceptance by an agent of a secret commission of compensation from the opposite party, where the agent is to exercise, on behalf of his principal, skill and judgment, vitiates the contract, and the principal who has thus been imposed upon may rescind the contract, even though the other party paid the commission or compensation in good faith." Mechem, Agency (2d ed.) § 2138. Cited with approval in *Weinhagen v. Hayes, ante,* p. 233, 178 N. W. 780, 183 N. W. 162.

Absolute fidelity and loyalty to the interests of his principal is the first duty and the highest obligation of an agent.

Having been hired as plaintiffs' agent, it was the duty of Bassuener to advise them with respect to the transaction in question. It was further his duty to bring home to the plaintiffs knowledge of his engagement as an agent for compensation on the part of the defendant *Jacob Spalinger.* Having failed to do this, he was guilty of disloyalty towards the plaintiffs, and this formed a sufficient basis for the rescission of the entire transaction.

At the time the negotiations transpired in the city of She-

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boygan for the exchange of these properties, the testimony shows that the defendant *Jacob Spalinger* stated that his farm was worth $7,000 and that he had been offered $7,000 for the farm. We find that the latter statement was made, under the clear preponderance of the credible evidence in the case, and that statement in itself, if false, constitutes a fraud warranting rescission.

In 20 Cyc. 59, it is said:

"Statements by a vendor that a third person has offered him a certain sum for the property is a statement of a material fact affecting the value and may form the basis for an action of deceit."

Whether the mere statement made by the defendant *Jacob Spalinger,* and as found by the court, namely, that his farm was worth $7,000, was a statement of fact or a statement of opinion, it is not necessary for us to decide. However, considering the inexperience of the plaintiffs with respect to farming and the value of farm lands, and the simplicity of their minds as shown by the short investigation made of the entire transaction, and the credulity of these plaintiffs, and particularly in connection with all the other facts and circumstances of the case, we are strongly inclined to hold that such a statement must be considered as a statement of fact rather than a statement of opinion.

It is said in the case of *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790:

"A study of the cases suggests the thought that, in the absence of an express intent to defraud, the determination of whether or not certain representations are statements of fact or of opinion depends upon whether or not the person to whom the representations are made may, under all the facts and circumstances of the case, including such person's capacity or want of capacity, rely upon them."

The bargain itself was grossly inequitable. Under it the plaintiffs parted with their equity in their property, amounting to $1,250, and agreed to pay the additional sum of

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$5,000, for a farm which was incumbered to the extent of $500 in excess of its value. A court of equity, therefore, in view of all the facts and circumstances of this case, will lend its aid in giving relief to the injured party.

By the Court.—Judgment affirmed.

STATE EX REL. MEYER, Petitioner, vs. PARK, Circuit Judge, Respondent.

May 7—May 31, 1921.

Venue: Trial of issues raised by counterclaim.

Under sub. 7, sec. 2619, Stats., providing that certain forms of action shall be tried in the county of defendant's residence, the defendant in an action to recover on promissory notes had an absolute right, upon compliance with the statutory requirements, to have such action tried in the county of his residence, though the answer in effect admitted the cause of action set out in plaintiff's complaint and interposed a counterclaim, the venue of such case being determined by the complaint, and not the counterclaim, in view of secs. 2595, 2620, 2621, 2622, and 2655. The interposing of the counterclaim did not institute a new action, even though the issues to be tried were those raised by the allegations of the counterclaim and the reply.

ACTION of *mandamus* commenced in this court to compel the circuit judge of the Seventh circuit to change the place of trial of an action, wherein A. P. Bean is plaintiff and *F. W. Meyer* is defendant, from Wood county to Barron county. The respondent moved to quash the alternative writ. The petition shows the following facts: A. P. Bean sued *F. W. Meyer,* the petitioner here, on two promissory notes. The complaint was served January 12, 1921, and on January 31st the defendant served a notice of appearance with a demand that the place of trial be changed to Barron county. The demand was accompanied by an affidavit in which *Meyer* alleged "that he resides in the city of Barron,

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Barron county, Wisconsin, and has so resided for approximately ten years." At the same time the defendant served an answer by way of counterclaim, alleging that in the year 1909 the defendant had purchased from the plaintiff certain cattle which were said to be free from disease and suitable for breeding purposes; that such cattle were in fact infected with contagious abortion, to the plaintiff's damage in the sum of $1,000. The prayer was as follows:

"Wherefore defendant demands judgment against the plaintiff for the sum of $1,000 damages, less the amount of plaintiff's claim herein, and for the costs and disbursements of this action."

The allegations of the complaint were not answered nor in any way referred to.

The plaintiff did not consent to the change of venue and thereupon the defendant moved for such change, which motion was opposed by the plaintiff by counter-affidavit relating to the merits of the counterclaim but not denying the facts as to the residence of the defendant. The circuit court denied the motion, with costs. This action was begun to compel the circuit judge to enter an order changing the venue.

For the petitioner the cause was submitted on the brief of *C. C. & A. E. Coe* of Barron.

For the respondent there was a brief by *D. D. Conway,* and oral argument by *C. R. Barney,* both of Wisconsin Rapids.

ROSENBERRY, J. Subject to the right of the defendant to change the place of trial (sec. 2620, Stats.), the county designated in the complaint shall be the place of trial.

"Sec. 2619. The proper place of trial of civil actions is as follows, respectively: . . .

"Seventh. Of any other action, the county in which any defendant resides at the commencement of the action; . . ."

By sec. 2621 it is provided that when the county desig-

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nated in the summons and complaint is not the proper place of trial, defendant may, within twenty days after the service of the complaint, serve upon the attorney for the plaintiff a demand in writing that the trial be had within the proper county, naming it, and the reason therefor. The plaintiff's attorney is then required, within five days after such service, to serve a written consent that the place of trial be changed, and if such consent be not served the defendant may move to change the place of trial, and if his motion is granted he is entitled to costs.

It is to be noted that in secs. 2619, 2620, 2621, and 2622, relating to change of place of trial, no reference is made to matters which may be set up by the defendant by way of defense to the matter alleged in the complaint or by way of counterclaim.

The argument here on behalf of the respondent is that the defendant having by service of his answer admitted the cause of action set out in the plaintiff's complaint, sec. 2619 has no application because there will be, as a matter of law, no trial of the matters constituting the plaintiff's cause of action; that such trial as there may be will be upon the issues made by the plaintiff's reply to the defendant's counterclaim, and as to that the defendant is, in effect, plaintiff, and the plaintiff is, in effect, defendant, and that therefore the county designated in the summons and complaint as the place of trial is the proper county, being the county of the plaintiff's residence.

The argument made by respondent is certainly logical. The only difficulty is that the statute makes no provision for such a contingency. The cause of action stated in the plaintiff's complaint is one described in sub. 7 of sec. 2619. When the complaint was served the defendant had a statutory right to have the venue of the action changed, irrespective of the allegations contained in his answer, it being

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an established fact that the defendant was a resident of Barron county.

A brief consideration of the nature of the right claimed by the petitioner in this action shows quite conclusively that the prayer of the petition should be granted.

"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Sec. 2595, Stats.

The proper place of trial of a civil action is that designated by sec. 2619. The forms of pleading in civil actions are prescribed by ch. 121, Stats. The first pleading in the action is a complaint. To the complaint the defendant may demur or answer. If the defendant answers, it may be by way of a general or specific denial or by "a statement of any new matter constituting a defense or counterclaim." Sec. 2655. The matters set up in the counterclaim, where the answer embraces such a pleading, may and usually do present a different issue than that tendered by the complaint, but it is still a pleading in the action and not the commencement of a new action, although the counterclaim must set out a cause of action. Under sec. 6, ch. 123, R. S. 1858, it was held that the court in which the motion to change the venue of the action was made might consider whether or not venue in justice should be changed where the convenience of witnesses and the ends of justice require it to remain in the county designated in the summons and complaint. *Couillard v. Johnson,* 24 Wis. 533 (1869). The statute then provided:

"The court may change the place of trial in the following cases:

"1. Where the county designated for that purpose in the complaint is not the proper county.

"2. Where there is reason to believe that an impartial trial cannot be had therein.

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"3. When the convenience of witnesses and the ends of justice would be promoted by the change.

"4. When the parties or their attorneys shall stipulate in writing to change the place of trial."

Couillard v. Johnson was followed in *Bonnell v. Esterly,* 30 Wis. 549 (1872). The statute was amended by ch. 185, Laws 1869, by which it was provided that the defendant "shall, before the time for answering expires, demand that the trial be had in the county where such defendant resides," and staying all further proceedings until the matter be determined by the court; and it further provided that the defendant shall have thirty days after the consent or determination of the motion, as the case might be, in which to answer the complaint. The statute in its present form appeared in the revision of 1878 as sec. 2621.

In *Van Kleck v. Hanchett,* 51 Wis. 398, 8 N. W. 236 (1881), it was held that a change of venue could not be refused on the ground that a trial of the action in the court in which it was pending will promote the convenience of witnesses, and emphasis was placed upon the fact that in that case no answer had been served, which distinguished it from *Couillard v. Johnson, supra.*

In *Meiners v. Loeb,* 64 Wis. 343, 25 N. W. 216 (1885), it was held that the right of the defendant to a change of venue when the county designated in the complaint is not the proper place of trial is absolute if the demand and motion therefor are duly made; and it was further held that the court could not retain the cause on the ground that the convenience of witnesses and the ends of justice would be thereby promoted. The decision was placed upon the language of the statute as it then stood and still stands. The difference between the law as stated in sec. 2621, R. S. 1878, and the statute as it was at the time of the decision in *Couillard v. Johnson* was noted. *Meiners v. Loeb* was fol-

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lowed in *Maher v. Davis & Starr L. Co.* 86 Wis. 530, 57 N. W. 357 (1893).

The latest case in which the nature of this right is discussed is *Stahl v. Broeckert,* 167 Wis. 113, 166 N. W. 653 (1918), where the court says:

"The statute prescribes the proper place of trial. When an action is commenced in an improper county it is in defiance of statutory provisions. The plaintiff has no right to have the action tried therein unless the right to have it tried in some proper county is waived by defendants through failure timely to take the necessary steps to have the place of trial changed. If any of the defendants demand that the action be tried in the proper county the plaintiff is in no position to object. He should have brought the action in the proper county in the first instance. He should not be permitted to profit by his disregard of statutory requirements and force a trial of the action in an improper county against the demand of any of the defendants that the action be had in the proper county. In other words, the statute fixes the proper place of trial, and any defendant has a right to have the action tried in some proper county, even though such right be not insisted upon or, for that matter, desired by all of the defendants."

The right of the petitioner, therefore, to have the case removed to Barron county was an absolute, not a qualified right. The statute has created no exceptions and none exist if the defendant complies with the provisions of the statute. It is urged that the moving papers did not disclose with sufficient certainty the fact that the defendant resided in Barron county. We think that fact clearly appears. The trial court did not base its decision upon any defect in the papers upon which the motion was based but upon the broad ground that, the allegations of the complaint not being denied, there could be as to the matters contained in the plaintiff's complaint no trial and consequently no place of trial. There will be a trial in this action, and while the

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issues to be tried will be those raised by the allegations of the counterclaim and the reply, it will be a trial of the action begun by Bean and not of another action. While the counterclaim embraces a cause of action, a new action is not begun.

By the Court.—Let the writ issue as prayed in the petition.

ESCHWEILER, J., dissents.

STATE EX REL. MILWAUKEE SALES AND INVESTMENT COMPANY, Plaintiff, vs. RAILROAD COMMISSION and others, Defendants.

May 6—June 21, 1921.

Constitutional law: Equal protection of the laws: Regulation of rents in particular counties: Validity: Classification: Basis.

1. The provisions of both the federal and state constitutions guaranteeing equal protection of the laws were intended to safeguard the fundamental right of equality before the law and to prevent the enactment of a law which makes unjust discrimination by depriving one person of a right in dealing with his property which it grants another of the same class under like circumstances.
2. Though the guaranty of equal protection of the laws does not prevent the legislature from making classification of persons, occupations, or industries for special regulation if there are reasonable and proper economic, political, or social reasons for so doing, it does not justify denying to one class rights and privileges that are granted to another under the same conditions and circumstances.
3. Ch. 16, Laws 1920 (Special Session), enacted to meet the housing emergency resulting from the war, but which was to apply only to counties having a population of 250,000 or more, denies equal protection of the laws to landlords in those counties, since such emergency existed also in other counties; and the mere fact that more people were affected thereby in a large county does not furnish reasonable ground for separate legislation for such counties.

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ORIGINAL ACTION in this court to determine the validity of the so-called "Rent Law."

On June 21, 1921, the following opinion was filed:

PER CURIAM. The law embodied in ch. 16, Laws of Special Session of 1920, commonly referred to as the "Rent Law," is held invalid upon the ground that it is special legislation prohibited by the constitution of Wisconsin. An opinion by the court will be filed hereafter.

VINJE and OWEN, JJ., dissent.

DOERFLER, J., took no part.

On July 13, 1921, the following opinion was filed:

Action brought in this court to enjoin the *Railroad Commission* from enforcing the provisions of ch. 16, Laws of 1920 (Special Session), against the plaintiff, a corporation of this state duly authorized and empowered to own real estate.

The plaintiff avers that it owns real estate in Milwaukee county and alleges that the *Railroad Commission* of Wisconsin is proceeding against *Oscar Brachman,* as the plaintiff's agent for the management of plaintiff's real estate in the city of Milwaukee and the county, under the powers conferred on the *Commission* by ch. 16, Laws of 1920 (Special Session), to coerce and compel him to comply with the provisions of such act. It is alleged that the *Commission* is about to determine what are reasonable rents for plaintiff's apartment building upon its real estate in such county for the purpose of enforcing such rents against plaintiff in leasing such property and to compel plaintiff to accept such rent on contracts heretofore made or hereafter to be made. Petitioner further alleges that such proceedings on the part of the *Railroad Commission* would greatly reduce and injure the value of plaintiff's property and deprive it of the free

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use and enjoyment thereof and of the right to freely contract in relation thereto and thus deprive plaintiff of the rights guaranteed to it by the state and federal constitutions.

The plaintiff demands that ch. 16, Laws of 1920 (Special Session), be declared void and of no force and effect. The *Railroad Commission* answered the allegations of the complaint and seeks to justify its proceedings under the provisions of the act above referred to. The plaintiff demurred to the defendant's answer upon the ground that the facts pleaded do not constitute a good defense to the action.

For the plaintiff there were briefs by *Fish, Marshutz & Hoffman,* attorneys, and *Irving A. Fish,* of counsel, all of Milwaukee, and oral argument by *Irving A. Fish* and *Joseph H. Marshutz.*

The *Attorney General* and *Winfield W. Gilman,* assistant attorney general, for the defendants.

SIEBECKER, C. J. The act (sec. 1) declares:

"The provisions of this act are made necessary by a public emergency growing out of the world war, resulting in such housing conditions in cities of this state that the freedom of contract in connection therewith has been impaired, and unjust, unreasonable and oppressive agreements for the payment of rent and for rental service have been and are now being exacted by landlords from tenants, which conditions seriously affect and endanger the public welfare, health and morals. It is also declared that this act is enacted as temporary emergency legislation and that it shall terminate on April 30, 1923, unless sooner repealed."

The act defines what is "rental property" and "service" in connection with such property, and other terms as used and employed in the act. By sec. 3 it is provided:

"All rents, charges, or other terms or conditions for the use or occupancy of rental property and all services in connection therewith shall be reasonable and just, and every unreasonable or unjust rent, charge, or other term or condition for the use or occupancy of rental property or service in connection therewith is prohibited and declared unlawful."

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By sec. 4 the *Railroad Commission* "is vested with power and jurisdiction to carry out the provisions and intent of this act and may do all things reasonably necessary and convenient in the exercise of such power and jurisdiction." By sec. 9 it is provided that:

"All rents or charges fixed by the commission shall be in force and *prima facie* lawful and all service, regulations, practices, terms and conditions prescribed by the commission shall be in force and shall be *prima facie* reasonable until finally found otherwise in an action brought for that purpose pursuant to the provisions of section 10. Such orders shall remain effective, notwithstanding any change in ownership or tenancy of the property affected thereby, unless and until the commission modifies or sets aside such orders upon complaint either of the owner or of the tenant."

The other provisions of the act make regulations for the enforcement of the act by the *Commission,* prescribe the procedure for this purpose, how proceedings before the *Commission* are to be instituted for review of the orders the *Commission* may make, what powers the *Commission* may exercise and the manner in which it is to exert and execute them. The act also prescribes that, when rents or charges collected or received by owners of rented property are in excess of those fixed by the *Commission,* an amount double the amount of such excess may be recovered in an action, together with the costs of the proceeding. There are other detailed provisions which need not be referred to for the purposes of this case.

This legislation is assailed as invalid upon the ground that it deprives the plaintiff of its private property and its freedom to contract with respect thereto, and thus deprives it of its liberty and its property and enjoyment thereof, and that it deprives it of the equal protection of the law as guaranteed it by the state and federal constitutions. The state asserts that the legislation is a proper exercise of the police power in the light of the emergency, which the legislature declared existed, respecting housing conditions conse-

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quent upon the world war, and that such conditions were more acute in the larger centers of population and places immediately adjoining them than in the more sparsely settled communities. It is well known that similar legislation was enacted in other states and by Congress for the District of Columbia. In the view we take of this case it is not necessary to discuss the question whether the legislation pertains to a subject properly within the sovereign power of the state to regulate in the manner attempted in this act. This subject has recently received consideration at the hands of the federal supreme court, the court of appeals of the state of New York, and other courts, resulting in a divergence of views which we shall not attempt to state; they are fully and ably presented in the briefs of counsel for the respective parties. Assuming, without deciding, that the act deals with a subject properly within legislative control under the police power of the state and that an emergency for the regulation existed as declared by the legislature in the act, the question is presented: Did the legislature, in exerting its power in the manner prescribed by the act, violate any of the rights guaranteed the plaintiff by the federal and state constitutions? At the threshold of this inquiry the claim is made by the plaintiff that the act is invalid because it deprives it of the equal protection of the law. Equality of rights and privileges is the underlying purpose to be accomplished by our constitutional system of government. "If special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government." This principle was aptly stated by Mr. Cooley in his work on Constitutional Limitations (5th ed. p. 486) and approved by the court in *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79, 22 Sup. Ct. 30, in the words following:

"Every one has a right to demand that he be governed by general rules, and a special statute which, without his

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consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. . . . It is emphasized in that clause of the Fourteenth amendment which prohibits any state to deny to any individual the equal protection of the laws."

This principle of government has been held from an early date to be embodied in the constitution of this state. See *Bull v. Conroe,* 13 Wis. 233; *Durkee v. Janesville,* 28 Wis. 464; *Hincks v. Milwaukee,* 46 Wis. 559. The opinion of Mr. Chief Justice DIXON in *Phelps v. Rooney,* 9 Wis. 70, is approved by the court in later cases. The late Mr. Chief Justice WINSLOW, speaking for the court in *Black v. State,* 113 Wis. 205, 89 N. W. 522, on this subject declared:

"The emphatic protest against special privileges to any favored persons or class of persons may be found in varying terms in all of our constitutions. Our fathers came here to escape the reign of privilege, and they made equality before the law the very cornerstone of their plan of government. In our constitution it is thus expressed in sec. 1, art. I: 'All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed.' This may be said to be somewhat vague and general,—somewhat in the nature of a rhetorical flourish; but when it is said that *all men equally free have the inherent rights of life, liberty, and the pursuit of happiness,* it is certain that it is not meant that some have or may have greater privileges before the law than others. The phrase must mean equality before the law if it means anything."

A law which makes unjust discrimination, which deprives one person of a right in dealing with his property and grants it to another of the same class under like circumstances and conditions, operates as a denial of the equal protection of the law and offends against the constitutional principles guaranteeing these rights. But it is urged that the legisla-

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ture, under its power to classify persons and enact general laws to regulate the rights of each class, has acted upon sufficient and proper grounds in this respect by making this statute applicable only to counties having a population of 250,000 and over. It is well established that the legislature may make classifications of persons, occupations, or industries and select them for special regulation if there are reasonable and proper economic, political, or social reasons for doing so. The subject of classification has often been treated in the decisions of this court and received elaborate treatment in *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468. With reference to the constitutional rule of equal protection of the laws it was there stated:

"Such command does not require that all property or all persons shall be treated exactly alike, but permits separation of either into classes of property or of persons similarly conditioned or situated, having characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general and public purpose and object of the particular legislation."

While this right to classify must be fully recognized it must nevertheless always be borne in mind that the equal protection of the laws is guaranteed, and that if any classification made in a statute seeking to regulate property and contract rights denies to one class rights and privileges which are granted to another under the same conditions and circumstances, it offends against the principle of equal protection of the law. It therefore becomes important to see in what respects, if any, lack of uniformity exists in the act before us. As above indicated, the legislature declared that the act was made necessary by a public emergency arising out of the world war, resulting in housing conditions in cities of this state which impaired the freedom of contracting in connection therewith and led to the exacting of unreasonable, unjust, and oppressive agreements for the pay-

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ment of rents and rental services, which injuriously affects and endangers the public welfare, health, and morals. The fact is commonly known that the conditions found by the legislature did generally exist throughout this and other states. The evils resulting therefrom, and which this legislation seeks to remedy, were incident to the conditions wherever they existed and were equally pernicious in their effects upon tenants everywhere. It is urged, however, that the legislative judgment in applying the law only to the class of landlords operating the business in thickly settled communities necessarily implies that the resultant evils were found to be a greater menace to the public welfare, health, and morals in such communities than in the sparsely settled districts of the state. But can it reasonably be said that such is the fact? Do the evils enumerated in the act in fact affect the public differently in counties having 250,000 population and over than in those having a lesser population? It is a matter of common knowledge that the oppressive exactions denounced by the act are as objectionable in their effects upon the public in the smaller cities of the state as in the larger ones and that the evil produced no different conditions in the county of Milwaukee than in other counties of the state. True, a larger number of persons were affected in Milwaukee county than in any other county, but this in no way caused a different economic, social, or political condition in this county than in any other county of the state where the evil existed. We find nothing in the conditions and characteristics affecting persons and property of landlords and tenants embraced in this act that distinguishes those in one county from those of any other county of the state in any respects germane to the purposes of this act.

The classification made by the act fails in that it is not based on characteristics legitimately distinguishing the members of one class from those of the others in respects germane to the public purpose and object of this legislation,

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and results in depriving the owners of "rental property" within the terms of the act of constitutional rights accorded owners of like property who are not subject thereto. The result is that the liberty of the persons subject to the act has been infringed upon and the personal and property rights guaranteed them by the constitution have been discriminated against in a way which deprives them of the equal protection of the law. Upon these grounds the act must be held to be invalid and of no effect.

By the Court.—The complaint must be held to state a good cause of action, and the members of the *Railroad Commission* of the state of Wisconsin are ordered to be restrained and enjoined from proceeding in any way to enforce the provisions of the act.

VINJE and OWEN, JJ., dissent.

DOERFLER, J., took no part.

INDUSTRIAL CO-OPERATIVE UNION, Appellant, vs. LEWIS and others, Respondents.

April 6—July 13, 1921.

Corporations: Action to enforce subscriptions to capital stock: Defenses: Fraud and misrepresentations: Past or present facts: Future transactions: Evidence: Representations on other occasions: Stipulations: Consolidating actions: Cumulative evidence: Trial: Changing answers in special verdict.

1. In an action by a corporation on a note given upon subscribing for capital stock of the corporation, where the maker testified to fraudulent representations by the agent of the corporation, which were denied by the agent, the jury's finding against the fraud cannot be said to be against the overwhelming weight of the evidence.
2. Where the defense to the action was that the subscription was induced by fraudulent representations, evidence that the agent of the corporation had made similar representations to other

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subscribers to procure notes from them is immaterial on the question whether such representations were made, and for that reason is incompetent as impeaching testimony.

3. In determining whether a verdict is against the great weight of the evidence the trial court cannot consider evidence which is not only immaterial but is without probative force.
4. When a special verdict has been returned it is an invasion of the province of the jury for the court to change the findings if there is evidence which, if undisputed, supports them. The question as to where the weight or preponderance of the evidence lies is not material.
5. Where numerous actions were begun on notes given by subscribers for corporate stock, in each of which the defense was fraudulent representations, a stipulation that one case should be tried and its decision should determine all the others, and that at the trial of such case each defendant should be permitted to testify as to his dealings with the plaintiff, did not make the testimony of the different defendants as to representations made to them by the agent of the corporation cumulative testimony which could be considered in determining whether he made the representations charged to the defendant whose case was on trial.
6. Representations, to be fraudulent, must relate to a present or past state of facts. Mere promises, predictions, or opinions as to future transactions do not warrant relief as for deceit where they are not performed or do not come true.

SIEBECKER, C. J., and VINJE, J., dissent.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

This action was brought to recover on a promissory note, the defense being that its execution was induced by fraud. The jury returned the following special verdict:

"(1) Did the agent of the plaintiff, *Industrial Co-operative Union,* for the purpose of inducing the defendant to sign the stock subscription and promissory note in question, represent to the defendant—

"(a) That the *Industrial Co-operative Union* was an established corporation doing business in the city of Milwaukee? *A.* No.

"(b) That the *Industrial Co-operative Union* owned a large warehouse in Milwaukee which it used for storing and handling farm produce? *A.* No.

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"(c) That the *Industrial Co-operative Union* would purchase all the milk produced by the defendant on his farm? *A.* Yes.

"(d) That the *Industrial Co-operative Union* would make special arrangement to transport the milk of the defendant, and other farmers in his vicinity, to the place of business of the plaintiff in Milwaukee by January 1, 1917? *A.* Yes.

"(e) That the *Industrial Co-operative Union* would notify the defendant as soon as it was ready to receive said milk? *A.* Yes.

"(f) That the *Industrial Co-operative Union* would purchase all the produce raised on the defendant's farm? *A.* Yes.

"(g) That the *Industrial Co-operative Union* would sell farm supplies and merchandise to the defendant at less than the market price? *A.* Yes.

"(2) If you answer any of the items of question 1 'Yes,' then answer this: Did the plaintiff believe such representations to be true? *A.* Yes.

"(3) If you answer question 2 'Yes,' then answer this: Did the defendant rely upon such representations in signing said stock subscription and promissory note? *A.* Yes.

"(4) If you answer either item (a) or item (b) of question 1 'Yes,' then answer this: Was such a representation false? *A.* ——.

"(5) If you answer either item (c) or item (d) or item (f) or item (g) of question 1 'Yes,' then answer this: Was said *Industrial Co-operative Union* ready and able January 1, 1917—

"(a) To purchase all the milk produced by the defendant on his farm? *A.* No.

"(b) To transport the milk of the defendant, and other farmers in his vicinity, to the plaintiff's place of business in Milwaukee? *A.* No.

"(c) To purchase all the produce raised on defendant's farm? *A.* No.

"(d) To sell farm supplies and merchandise to the defendant at less than market price? *A.* No.

"(6) (a) Did the *Industrial Co-operative Union* notify the defendant by January 1, 1917, that it was ready to receive his milk? *A.* No.

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"(b) Or that it was ready to fulfil its said representations specified in question 1? *A.* No.

"(7) If you answer any of the items of question 1 'Yes' and questions 2 and 3 'Yes,' then answer this: Ought the defendant, in view of his intelligence and experience, in the exercise of ordinary care to have known or discovered the falsity of said representations or the inability and unreadiness of the *Industrial Co-operative Union* to fulfil its said representations by January 1, 1917, before signing said stock subscription and promissory note? *A.* Yes."

There were the usual motions by the plaintiff and defendant, and upon a hearing the court entered an order changing the answers of the jury to subdivisions (a) and (b) of question 1 from "No" to "Yes," supplying the answer "Yes" to question 4, changing the answer to question 7 from "Yes" to "No," and upon the verdict as amended the defendant had judgment dismissing the complaint, from which the plaintiff appeals.

Michael Levin of Milwaukee, for the appellant.

For the respondents there was a brief by *Gittings & Moyle,* attorneys, and *Guy A. Benson,* of counsel, all of Racine; and the cause was argued orally by *Mr. O. R. Moyle* and *Mr. Benson.*

The following opinion was filed May 3, 1921:

ROSENBERRY, J. The questions presented upon this appeal are complicated by a stipulation entered into between the parties at the commencement of the trial to the following effect: It is first recited that the actions, forty-seven in number, are on account of subscriptions given for the capital stock of the plaintiff company; that the questions involved in each case are similar, and that it had been agreed that the action against *E. E. Lewis* should be tried; that all of the defendants were to abide by the decision in that case. It is then provided:

"First. That all the above entitled actions are hereby consolidated and the same may be deemed one action."

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The second and third clauses of the stipulation provide for entry of judgment against each defendant, depending upon the result in the *Lewis* case. It is then further provided by the fourth paragraph that any party may appeal to the supreme court from the decision of the circuit court and that the rights of the parties under the stipulation shall not be effective until a decision and determination by the supreme court. At the opening of the trial it was stipulated orally upon the record "that in this action any or all of said defendants shall be permitted to testify about their dealings with the plaintiff on the trial of this action if they so desire." This latter stipulation was entered into evidently for the purpose of preserving the right of any defendant to offer evidence peculiar to his situation. It was not claimed upon the trial that the representations were made to any of the various defendants at a time when they were together, but it appeared that they were made at different times and upon separate occasions.

It is argued that the trial court was in error in changing the answers to subdivisions (a) and (b) of question 1 and the answer to question 7 of the special verdict. In passing upon that matter the court said:

"The court is satisfied that the clear weight of satisfactory evidence is that the plaintiff's agent did represent to the defendant that the *Industrial Co-operative Union* was then an established corporation doing business in the city of Milwaukee and that it owned a large warehouse in Milwaukee which it used for storing and handling farm produce. Several witnesses unhesitatingly and convincingly so testified, and the only contradiction thereof is made by the plaintiff's agent."

As to the representations made to *Mr. Lewis,* the plaintiff's agent testified that they were not made, and *Mr. Lewis* testified that they were made, and as to those representations there was no other evidence upon either side; and this

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is substantially the situation as to each of the other defendants.

The making and execution of the note was admitted. The burden was upon the defendant to establish by clear and satisfactory evidence that his signature thereto had been secured by fraud. Whether it had been so secured was a pure question of fact, a matter wholly and peculiarly within the province of the jury. The plaintiff, by stipulating that the actions might be tried together and that evidence might be received as to each defendant, subjected itself to the risk of its cumulative effect upon the jury. But a jury drawn from the neighborhood, having heard the evidence and seen the witnesses, chose to believe the agent of the plaintiff. We do not understand upon what theory the findings of the jury can be said to be against the overwhelming weight of the evidence. The jury by its verdict said that the testimony of the plaintiff's agent was more credible than that of the defendant.

If in setting aside the verdict the trial court considered evidence to the effect that similar representations had been made to other persons and under other circumstances and at other times, he proceeded upon a mistaken theory of the law, for such evidence was not material upon that issue and no claim of materiality could be made for it in the absence of the stipulation. It cannot be considered as impeaching testimony, for the representations made to another defendant are not material upon the question as to what representations were made to the defendant *Lewis* and therefore furnish no basis for impeachment. If the question involved the matter of knowledge, design, or intent, evidence of similar acts at different times and places might be material. *Chase v. Blodgett M. Co.* 111 Wis. 655, 87 N. W. 826; *Welch v. Dunning,* 163 Wis. 535, 158 N. W. 323. Here the question involved does not relate to knowledge, design, or intent. The question at issue is, Were the representa-

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tions made at all at the time and place in question? Evidence that similar representations were made at a different time and place and under different circumstances to another defendant is no evidence that they were made at the time and place in question to the defendant *Lewis*. *Lowe v. Ring*, 123 Wis. 107, 101 N. W. 381; *Moravetz v. McGovern*, 68 Wis. 312, 32 N. W. 290. In a case where nine witnesses were allowed to testify as to statements made on the part of the plaintiff to other persons not in the presence or hearing of the defendant and some of them long subsequent to the execution of the notes and agreement, this court said:

"Of course, such statements could not have induced the defendant to sign such papers. The admission of such testimony is sought to be justified, 'not for the purpose of proving the representations made to the defendant,' but to prove bad faith and an actual intent to deceive on the part of the plaintiff. This court has recently held that, in an action upon a contract of sale which the defendant claimed he had been induced to sign by false representations on the part of the plaintiff, it is immaterial whether such representations were made with a fraudulent intent or not, and that the admission of evidence of similar transactions between the plaintiff and other persons in no way involved in the litigation, offered for the purpose of showing such intent, was prejudicial error. *Standard M. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923. To permit such proof of numerous independent transactions imposed upon the plaintiff the burden of disproving a multitude of collateral charges, not in issue nor involved in the controversy, and therefore was highly prejudicial to the plaintiff." *J. H. Clark Co. v. Rice*, 127 Wis. 451, 464, 106 N. W. 231.

In determining whether the verdict of the jury is against the great weight of the evidence the trial court cannot take into consideration evidence which is not only immaterial but is without probative force.

The court also proceeded upon a wrong theory of the law as to when a trial court should set aside the verdict of a jury. Where, as here, the jury has returned a special verdict, it is an invasion of the province of the jury for the

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court to change the jury's findings if there is evidence which, if undisputed, supports the findings. The question as to where the weight or preponderance of the evidence lies is not material. *Conover v. Knight,* 91 Wis. 569, 65 N. W. 371; *Ohlweiler v. Lohmann,* 82 Wis. 198, 52 N. W. 172. In this case, if the witnesses were equally credible, the evidence was almost balanced. The scale must turn, therefore, in favor of that which is the more credible, a question which is peculiarly within the province of the jury. While the stipulation made evidence as to transactions between the plaintiff's agent and other defendants admissible, it did not give such evidence, when introduced, materiality as to any particular issue or endow it with probative force. In determining whether or not the evidence sustains the finding of the jury as to the representations made to any particular defendant, only evidence material upon that issue may be considered. The trial court was in error, therefore, in setting aside the answers to subdivisions (a) and (b) of question 1 and the answer to question 7, and the motion of plaintiff for judgment upon the verdict should have been granted.

The trial court correctly held that subdivisions (a) and (b) of question 1 covered "the pivotal and controlling elements of the case." Subdivisions (c) to (g), inclusive, relate to future transactions. Representations, to be fraudulent, must relate to a present or past state of facts. Mere promises, predictions, or opinions as to future transactions or events do not warrant relief as for deceit where they are not performed or do not come true. *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Warner v. Benjamin,* 89 Wis. 290, 296, 62 N. W. 179.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff as indicated in the opinion.

DOERFLER, J., took no part.

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The following opinion was filed May 10, 1921:

SIEBECKER, C. J. (*dissenting*). I cannot concur in the opinion of the court. The stipulation of the parties is construed by the court as not affecting the competency and admissibility of the evidence of the defendants who were not made parties to the action against *Lewis*. The stipulation entered into by the different defendants to the numerous actions when the action against *Lewis* was called for trial shows that these different actions were to "be deemed as one action" for the purpose of the trial of the issues of fraud raised by all the defendants. The pleadings in all the actions presented the inquiry whether or not the stock subscriptions were secured from all the defendants in the different actions by fraudulent representations of plaintiff's agent, Nickol. It was alleged in all these cases that Nickol made the false and fraudulent representations that the plaintiff was a corporation doing business in Milwaukee, that it had a building there in which it was conducting a business, and that plaintiff in the following January would have a milk train collect the milk of the subscribers of stock, take it to Milwaukee, and market it. I am convinced that the parties intended to make the evidence of the making of such alleged fraudulent representations to all of the defendants separately competent to prove that Nickol, in substance, made these representations to each defendant for the purpose of securing the stock subscriptions and the notes, and that the circuit court properly construed the stipulation to this effect. The evidence offered, when considered in this light, it seems to me, abundantly sustains the circuit court's conclusion that the weight of the evidence is overwhelmingly against the finding of the jury that the agent, Nickol, did not make such alleged false representations to the defendant *Lewis*. The trial court was peculiarly well qualified to pass upon the weight and credibility of all the witnesses, and

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his decision in this case should not be disturbed for the reason that it is not clearly wrong.

VINJE, J. I concur in the foregoing dissenting opinion by Mr. Chief Justice SIEBECKER.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

JOZEFOWICZ and wife, Respondents, vs. LEICKEM, Appellant.

April 6—July 13, 1921.

Escrows: Written instruments: Material parts of agreement resting in parol: Recall of instruments before compliance with conditions.

1. Instruments in writing containing the whole contract of sale or exchange of real property are proper subjects of escrow; but written instruments which do not contain the whole contract so as to comply with the statute of frauds are not proper subjects of escrow and can be recalled by either party, though left with a third party for delivery upon conditions.
2. To constitute a true escrow a contract of sale must be fully executed and nothing left but the transfer of title when the terms of the escrow, all of which must be expressed in the written agreement and not rest in parol, are complied with.
3. Plaintiff and defendant executed deeds to each other, reciting a consideration of one dollar and the exchange of real estate, and an agreement by each grantee to assume payment of a mortgage on the property received by each respectively. The deeds were deposited with an attorney with verbal directions to deliver the same to the grantees when each presented a receipt showing payment of the back interest on the mortgage on the land conveyed by him. Before defendant tendered his receipt plaintiff demanded from the depositary the return of his deed, which demand was refused and the deed delivered to defendant. *Held,* that there was no valid delivery of the deed, since a material part of the contract rested in parol, and plaintiff was entitled to a cancellation of the deed executed by him and which the defendant had recorded.

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APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Suit in equity to cancel a deed on the ground that one of the grantors had not signed it and on the further ground that there had been no valid delivery of the deed. The court found there had been no delivery of the deed and on that ground entered judgment canceling it. The defendant appealed.

For the appellant there was a brief by *Edward F. Higgins,* attorney, and *Buckmaster & Hammond,* of counsel, all of Kenosha; and the cause was argued orally by *Walter W. Hammond.*

John F. Kuehnl of Kenosha, attorney, and *Fred R. Wright* of Milwaukee, of counsel, for the respondents.

The following opinion was filed May 3, 1921:

VINJE, J. Plaintiffs, husband and wife, owned a lot in the city of Kenosha subject to a mortgage of $3,200, the title to which lot was in the husband and which they claimed was their homestead. The defendant owned a number of lots in Racine subject to mortgages aggregating $3,900. *Mr. Jozefowicz* and defendant entered into an agreement for the exchange of the properties, and for the purpose of executing such agreement *Mr. Jozefowicz* secured an attorney by the name of Powell to draw a deed conveying plaintiffs' title to defendant. Such deed was drawn and *Mr. Jozefowicz* signed it. It was afterward taken to his home, and defendant claims *Mr. Jozefowicz's* wife also signed and acknowledged it. This she denied. The defendant left a deed with Powell conveying his Racine property to plaintiffs, also a note for $590 and second mortgage to cover difference in value of properties. His deed recited a consideration of one dollar and the exchange of real estate, and plaintiff's deed contained the same recital as to con-

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sideration. Both deeds provided that the grantee or grantees assume and agree to pay the outstanding mortgages. Powell testified that when the papers were left with him it was the understanding of the parties that he should hold the papers till the defendant had paid up his back interest on the mortgages on his property and had presented a receipt therefor to him, and that plaintiffs were to do likewise as to the back interest on their mortgage. The papers were signed and left with Powell about March 8, 1919. Defendant did not tender his receipt for back interest to Powell until March 31, 1919. At least several days before that plaintiffs demanded from Powell the return of their deed, which demand he refused. Defendant had his deed recorded, he thinks, the day he got it from Powell. The deed was recorded March 31, 1919.

It will thus be seen that when the papers were left with Powell the contract for the exchange of properties was not fully completed. It is also apparent that the written papers did not express the full agreement. Each party was to pay up back interest on the mortgages on their respective properties and present a receipt therefor to Powell. Before that was done the plaintiffs refused to consummate the deal. Could they lawfully do so? It is clear that at the time the papers were completed and left with Powell no title passed, for it was expressly understood that he was to keep them and the trade was not to be consummated till the back interest was paid. It is equally clear that the papers drawn did not express the complete agreement as to consideration, for there was nothing said in them about the payment of back interest on mortgages up to the time of delivery. We have therefore a case where an escrow is attempted where there is a valid contract for the sale or exchange of real estate because a material part of the contract, namely, the true consideration agreed upon and the manner of payment,

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rested in parol. In such case either party may, before performance of the void contract, refuse to perform. *Campbell v. Thomas,* 42 Wis. 437. It is there said:

"In many of the cases cited there was no valid executory contract for the sale of the land, but the grantor permitted the deed to be delivered by the depositary to the grantee upon performance of the parol conditions of the deposit. Undoubtedly, the final delivery to the grantee in such cases operated to pass the title; as it would in the present case had the defendant seen fit to allow his void parol agreement to be thus consummated. In other cases cited there was a compliance with the statute of frauds. *Everts v. Agnes,* 4 Wis. 343, is one of them. But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depositary and recall the deed at any time before the conditions of the deposit have been complied with; provided those conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depositary." Page 450.

The rule is that instruments in writing containing the whole contract of sale or exchange are proper subjects of escrow, but that written instruments which do not contain the whole contract—in other words, which are within the statute of frauds—are not proper subjects of escrow and can be recalled by the grantors though left with a third party for delivery upon conditions. *Campbell v. Thomas,* 42 Wis. 437; *Popp v. Swanke,* 68 Wis. 364, 31 N. W. 916; *Kopp v. Reiter,* 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273 and note; *Barr v. Johnson,* 102 Ark. 377, 144 S. W. 527; *Moore, Keppel Co. v. Ward,* 71 W. Va. 393, 76 S. E. 807, 43 L. R. A. N. S. 390, and note.

To constitute a true escrow the contract of sale must be fully executed and nothing left but the transfer of title when the terms of the escrow are complied with. Those

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terms, however, cannot embody a substantive part of the contract of sale resting in parol, though the fact of escrow may be shown by parol. *Campbell v. Thomas,* 42 Wis. 437.

There was in fact no escrow here. The papers were left with the attorney who drew them with the understanding that the deal should not be considered closed till the interest matters were adjusted. Before they were, the plaintiffs refused to perform and Powell had no authority to deliver the deed. In a true escrow the grantor parts with dominion over the instrument when it is delivered to the third person. In this case the papers were left with the scrivener with the understanding that both parties were to perform further acts before the escrow should become operative, and it was optional with both to refuse to perform because the agreement rested in part in parol and was therefore not enforceable. Had plaintiffs permitted Powell to deliver, they no doubt would have precluded themselves from thereafter questioning the exchange as stated in *Campbell v. Thomas,* 42 Wis. 437, 450. Here objections to delivery were timely made, and the trial court correctly found that there had been no valid delivery of the deed, conceding it had been signed by the wife.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

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STRANG and another, Respondents, vs. CITY OF KENOSHA, Appellant.

April 6—July 13, 1921.

Municipal corporations: Defective highway: Insufficiency existing a few hours only: Notice: Defect occurring after repairs made: Trial: Instructions: Appeal: Presumed finding: Evidence to sustain: Issue not litigated at trial: Disposition of case.

1. In an action against a city for the death of persons riding in an automobile which struck a depression in the street and broke the steering gear so as to make the automobile unmanageable and resulted in a collision with a street car, an instruction that the intoxication of the driver of the automobile, if any, did not necessarily establish that he was not exercising due care did not invade the province of the jury when considered with the succeeding paragraph of the instruction to the effect that such fact, if found by the jury, was to be considered with all other facts to determine whether the driver was negligent.
2. Where the issue of notice of the alleged defect in the street was not submitted to the jury and there was no request for its submission, this court must assume that the trial court found such issue in favor of the plaintiffs (sec. 2858*m*, Stats.); but such presumed finding, however, must find support in the evidence and will be made only where there is evidence to sustain it.
3. The existence of a depression in a city street a few hours before an accident is insufficient to charge the city with notice of the defect.
4. Where the city had given permission to remove the paving to make a sewer connection, and after the completion of the work had inspected the place and had filled in a depression in the street and again inspected it the morning before the accident, the city is not charged with notice of the recurrence of a defect after such repairs, and is not liable unless it had actual or constructive notice of the subsequent defect and a reasonable opportunity to repair it.
5. Where a judgment for plaintiffs is reversed for failure of the evidence to show notice to the city of the defect complained of, a new trial will be granted where it appeared that such issue was not litigated at the former trial and the attention of the court and parties was not directed thereto.

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APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

Personal injury. The complainants allege that the defendant is a municipal corporation; that one Erickson was the owner and the driver of an automobile in which the deceased husbands of the plaintiffs were riding at the time of injuries resulting in their death; that the automobile, traveling in an easterly direction, was suddenly and without warning precipitated into an excavation and as a result of such precipitation the steering apparatus of the automobile was broken, the driver lost control of the machine, and while it was so out of control a collision occurred between the automobile and an approaching street car proceeding westerly along Elizabeth street; that the excavation was made in a brick pavement from the south curb northerly a distance of about twelve feet, was four feet in width and ten or twelve inches in depth; that such excavation had been in this condition continuously for five or six days prior to said injuries; that there were no lights or other warning signals or barriers guarding the excavation; that it was the duty of the defendant to keep and maintain the street in a reasonably safe condition for public travel, but that the defendant carelessly and negligently failed to perform the same, resulting in the injuries complained of. The answer denied that the automobile was precipitated into the excavation; denied that an excavation existed in the place referred to in the complaint, and alleged that the driver was guilty of contributory negligence. For convenience the cases were tried together, the issues in each case being identical. The jury returned a special verdict finding, first, that there was a depression in the street at the time and place in question; second, that the automobile ran into it; third, that the automobile was so injured thereby that the driver could not control it; fourth, that the driver was so injured thereby that he was unable to control the car; fifth, that the street was not in a reasonably safe condition for public travel;

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sixth, that such unsafe condition of the street was the proximate cause of the collision in question and resulted in the deaths of Strang and Smith; seventh, that no want of ordinary care on the part of Erickson, driving the car, proximately contributed to the cause of the collision; eighth, the damages were assessed at $4,000 for each of the plaintiffs. Plaintiffs had judgment, from which the defendant appeals.

For the appellant there was a brief by *John C. Slater,* attorney, and *Robert V. Baker,* of counsel, both of Kenosha, and oral argument by *Mr. Baker.*

Wallace Ingalls of Racine, attorney, and *Calvin Stewart* of Kenosha, of counsel, for respondents.

The following opinion was filed May 3, 1921:

ROSENBERRY, J. The undisputed facts show that the accident in question happened on Elizabeth street just easterly of a point where Salem avenue joins Elizabeth street. Elizabeth street runs east and west and there is upon it a single track of street railway. Salem avenue extends southwesterly beyond the corporate limits of the defendant city. At the point near the juncture of Salem avenue and Elizabeth street Kappus Brothers, at the time of the injuries, had excavated on their property on the south side of and fronting on Elizabeth street for a foundation for a building. One Sullivan had obtained a permit from the defendant city to remove the brick pavement on Elizabeth street a short distance east of the point where the easterly line of Salem avenue intersects the south line of Elizabeth street, for the purpose of making a sewer connection for the proposed new building. Sullivan removed the brick pavement on or about April 10th. The excavation was two feet wide and about ten feet in length, running north and south from a point about four feet north of the south curb of Elizabeth street to within one and one-half or two feet of the south rail of the railway track. The sewer connection was made, the

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excavation filled in, and on the 11th or 12th of April it was again filled. After the excavation made by Sullivan was filled and travel over the same had caused a natural settling, the excavation was filled from time to time by volunteers. The accident occurred between the hours of 7 and 8 on Saturday, April 26, 1919. It appears without dispute that on Thursday, April 24th, the excavation in question was filled with cinders and brought above a level with the surrounding pavement and so remained during Friday. The street commissioner of the defendant city testified that he was at the point in question on Saturday morning, the day of the accident, at about 8 or 9 o'clock, that he raked into the depression, which was then very slight, the material which had been thrown out by passing vehicles, and left the place substantially level. The teamster who had filled the excavation on Thursday testified that he was there on Saturday afternoon at about 4 o'clock; that he did not put in any additional filling because it was not necessary. Smith and Strang were with a party at Eagle's Hall in the afternoon of Saturday, at which time considerable liquor was taken by Erickson, the driver of the automobile, as well as by other members of the party. The party, consisting of eight or nine men, had started into the country, but were unable to proceed on account of the condition of the road, and were returning to the city on Salem avenue and Elizabeth street for the purpose of taking Smith and Strang to the railway station when the accident occurred.

One of the errors complained of is that the court instructed the jury to the effect that the mere fact that Erickson had been drinking previous to the accident or that he was under the influence of intoxicants at the time of the accident, if such be the facts, does not necessarily and of itself command the conclusion that he was not exercising such degree of care as is ordinarily exercised by the great majority of mankind not under the influence of intoxicat-

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ing liquor, under the same or similar circumstances. The instruction is not happily phrased, but in the succeeding paragraph the court carefully instructed the jury that the fact that Erickson was under the influence of intoxicating liquor, if they found that to be the fact, was to be taken into consideration with all the other facts to determine whether or not Erickson had been guilty of the want of ordinary care which contributed proximately to the cause of the injuries sustained by Smith and Strang. We do not think this was an invasion of the province of the jury.

We shall discuss but one of the remaining errors assigned. The court submitted no question to the jury and was requested to submit none as to whether or not the defendant had notice of the defect which caused the injury and had a reasonable opportunity for repairing the same.

There having been no request for the submission of that issue to the jury, we must assume that in granting judgment the court found that issue in favor of the plaintiffs. Sec. 2858*m*, Stats. Such presumed finding, however, must find support in the evidence and will only be made where there is evidence to sustain it. *Kraczek v. Falk Co.* 142 Wis. 570, 126 N. W. 30; *Gegare v. Fox River L. & L. Co.* 152 Wis. 548, 140 N. W. 305; *Korrer v. Madden,* 152 Wis. 646, 140 N. W. 325. A careful examination of the record convinces us that there is no evidence to sustain such a finding. The evidence as to the nature of the defect relates very largely to the time of or after the accident or before the repair was made on Thursday. One witness testifies that he observed the same at about 5 o'clock on Saturday afternoon and remarked that it was a bad hole to leave over Sunday. The case is entirely barren of evidence that the city had any notice of the condition of the excavation after that time and before the happening of the accident, and it must be said as a matter of law that the existence of the defect for a few hours would not charge the city with

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notice. It is argued by the plaintiffs that the defect was created by the city and that it had actual notice thereof. The defect which caused the injury was not created by the city, the excavation being made under a license issued by the city to the plumber. In addition to that the street had been twice repaired, and the evidence is undisputed that it was not in a defective condition on Friday or Saturday morning at the time the street commissioner visited it. This is not the case of an excavation left without barriers or an obstruction erected in the street without placing signals or warning signs, but is the case of a defect which had been twice fully repaired and left in a reasonably safe condition, and in order to charge the city notice of the defect which caused the injuries must be brought home to it in some way. The city having once repaired the street at the place in question, in order to make it liable it must have notice, actual or constructive, of a subsequent defect and a reasonable opportunity to repair. *Hallum v. Omro,* 122 Wis. 337, 99 N. W. 1051.

This issue was apparently not litigated upon the trial. Ordinarily we should reverse the judgment with directions to dismiss the complaint. But the issue not having been litigated and the attention of the court and parties not having been directed thereto, we are of the opinion that in the interest of the proper administration of justice there should be a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

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THOMAS, Administrator, Appellant, vs. LOCKWOOD OIL COMPANY, Respondent.

April 6—July 13, 1921.

Master and servant: Deviation from master's service: Driver of delivery truck: Discretion as to route: Loitering: Personal errand of servant: Volunteer assisting servant: Negligence: Injury to third person: Liability of master: Trial: Declarations of servant after event: Res gestæ: Impeachment: Use of adverse examination.

1. To relieve a master from liability to third persons arising from his servant's negligence on the ground that the servant had deviated from the service, such deviation must be so substantial as to amount to a departure therefrom and must be for purposes entirely personal to the servant.
2. The route to be traveled by an automobile truck driver, in the absence of express directions from his employer, is discretionary with the driver, and in selecting certain streets, in the exercise of such discretion, he is still within his master's service.
3. The driver's act in going around a block unnecessarily for the purpose of delaying return to his place of employment to avoid being sent out on another trip is not of itself a departure from the employer's service so as to exonerate the employer from responsibility for the driver's negligence; nor did the driver, while headed in a proper direction toward his master's place of employment, depart from his employment so as to exonerate the employer from responsibility for the death of a bicycle rider struck by the truck simply because its driver had an intention to again drive around the block in the hope of seeing a lady friend.
4. Where the driver's deviation from his route was slight and not unusual, the court may as a matter of law determine that he was still executing the master's business.
5. Where the driver was delivering oil and permitted a friend who was with him to drive the truck so that he could ascertain the cause of trouble in the operation of the truck and shift the position of a barrel, the driver's friend, in operating the truck, was an employee of the owner so as to render the latter liable to a third person struck by the truck.
6. Declarations of the driver at the police station to which he had accompanied a policeman from the scene of the injury

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are not admissible as part of the *res gestæ;* and testimony as to such declarations was inadmissible without a proper foundation being laid by first interrogating the witness.

7. Where an employee of an adverse party was examined before trial under sec. 4096, Stats., as to statements made by him in an affidavit, without the affidavit itself being offered at the time of such examination, the affidavit was not admissible as independent evidence at the time of the trial.

8. Under sub. 2, sec. 4096, Stats., as amended by ch. 246, Laws 1913, testimony of defendant's employee, taken by plaintiff before trial under such statute, was not available to defendant during the trial in the absence of a showing that such employee could not attend the trial as a witness.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Plaintiff, the father of Michael Thomas, a boy about thirteen years of age at the time of his death, was appointed administrator and brought this action against the defendant to recover damages for the death of said son.

The defendant corporation was engaged in the business of selling gasoline and oil in the city of Racine. It used a number of automobile trucks for delivery purposes. On July 17, 1920, one such automobile truck was being operated by Arthur Finch, then about nineteen years old, having had some previous experience in driving motor trucks and who had commenced his service for the defendant on that day. He made a round trip in the forenoon and had finished his assigned afternoon delivery about 5 o'clock at a junk yard on the north side of the city. At that time he had a barrel of oil still on the truck which was to be taken back. Shortly after leaving the last point of delivery he met an acquaintance named Larson who proceeded with him. The map on page 488 shows the location and names of the streets that will be referred to in this statement of facts.

Defendant's place of business was near the corner of Racine and Fourteenth streets, close to the tracks of the Chicago, Milwaukee & St. Paul Railway. A school referred

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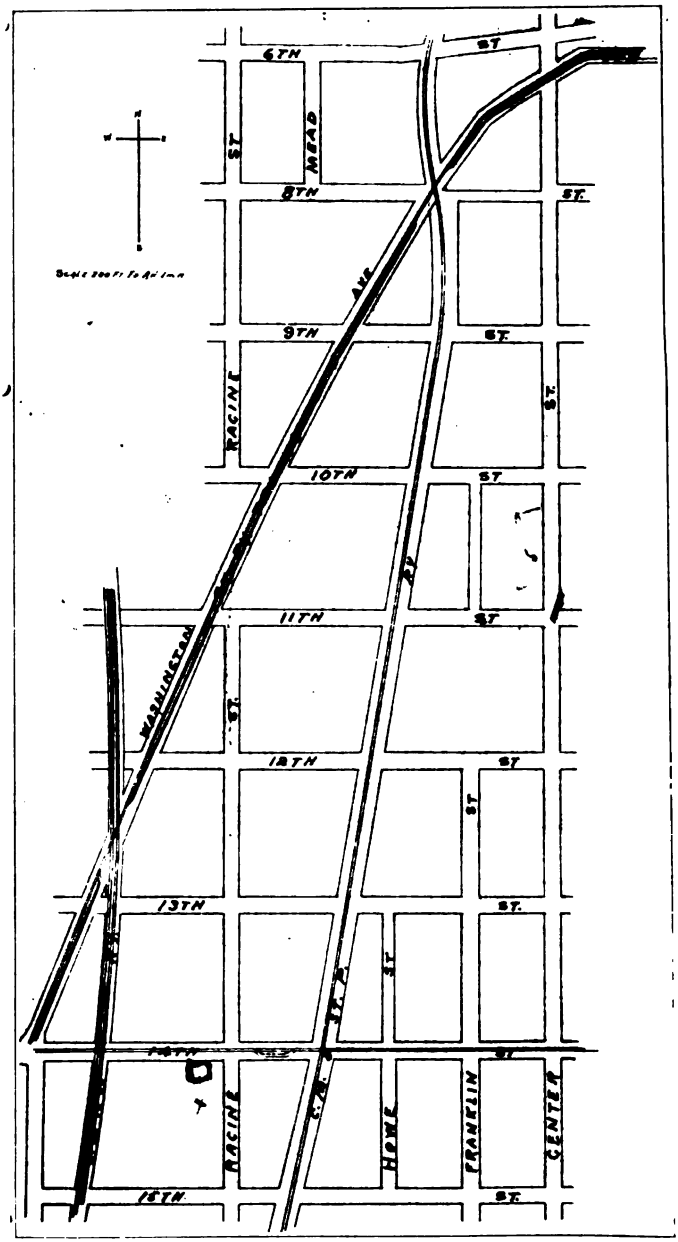

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to in the testimony was on Center street between Tenth and Eleventh streets.

After reaching Sixth and Mead streets Finch drove south on Mead, east on Eighth to Washington avenue, which on all the portions shown on the map was occupied by the double tracks of a street railway. He proceeded southwesterly on Washington avenue to Ninth, east on Ninth to Center street, thence south to Eleventh, thence west to Franklin, thence north on Franklin to Tenth street, east on Tenth again to Center, then south on Center.

A little near the center and on the west side of Center street between Tenth and Eleventh, a pile of brick extended out about ten feet from the curb. Michael Thomas, riding on a bicycle south on Center street, was just going around the pile of brick when he was struck and almost instantly killed by defendant's truck.

Arthur Finch, defendant's driver and employee, was not called as a witness upon the trial by either side. He was examined adversely by plaintiff prior thereto under the provisions of sec. 4096, Stats., and on the trial the plaintiff offered in evidence part of the testimony so taken; among other things the following: "*Q*. Where were you going after you left the Fox junk yard? [This was the last place of delivery that afternoon.] *A*. I was going home. *Q*. Back to the garage? *A*. Yes." And again: "*Q*. So when you left Fox's junk yard you then started back to the garage; is that right? *A*. Yes." That he permitted Larson to take his seat at the driving wheel and operate the truck when they were about the middle of the block on Tenth street between Franklin and Center and that Larson continued to drive until the time of the accident. That his only purpose in letting Larson drive was that he, Finch, might go back and move the barrel to the rear on the truck, and that there was oil dripping off the truck, the barrel was dripping, the transmission was hot and it was smoking. That he had never permitted any one else to drive the truck other than Larson

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and had been given no instructions by the company with reference to any one else being permitted or not to drive.

After plaintiff rested his case defendant offered in evidence, by way of defense, certain portions of such examination. To such offer plaintiff's counsel objected, basing the objection upon the portion of sub. 2, sec. 4096, Stats., quoted in the opinion. The objection was overruled. Defendant's counsel then offered from such deposition Finch's testimony as to his procedure after reaching Ninth and Center streets and also that to the effect that he thought it was then too early to go back to the plant; that if he got there too early they would send him out with another load, so he determined to ride around the school to see his girl living on Franklin street; that she was not seen then, and he went around again and got half way around and Larson asked him to let him drive the truck; that he, Finch, then went back on the truck to move the barrel to the end of it so that when they got back to the garage they could get it off quickly and he could get home. That the girl in question was one with whom he had just got acquainted, that he did not know her last name; that he might have gone south on Franklin from Tenth street (this, it should be noted, would have kept him going south on Franklin instead of making the longer turn down Center and Eleventh); that he made up his mind to turn over to get onto Franklin street when he came up as far as Eleventh; that he made up his mind to go around to see his friend before he left the junk yard; that the way he took was the shortest way to get there; that at the time he came down to West street and took Larson aboard he expected to go up and see the girl.

Over plaintiff's objection defendant was permitted to read portions of Finch's examination by defendant's counsel, in substance as follows:

"*Q.* Now you didn't want to get back to the garage of the *Lockwood Oil Company,* did you, until pretty near 6 or a quarter of 6? *A.* No. *Q.* Why didn't you want to

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go back to the *Lockwood Oil Company?* *A.* To go over to see my girl. *Q.* Was there any other reason why you didn't want to get back to the garage? *A.* Send me out with something else if I got back too quick. *Q.* So you didn't want to get back so early, you might run the chance of getting sent out again, isn't that right? *A.* Yes. *Q.* When you were at Fox's junk shop you made up your mind you would kill time, we will say, by going to see your girl before you went back to the garage, isn't that right? *A.* Yes."

And also the following:

"I intended to go around the block again after I passed her house and came up to Ninth street. I had made up my mind I didn't want to get back to the garage until 6 o'clock. The accident happened about 5:30. That I made up my mind at 5 o'clock when at the junk yard to go to see this girl; that I did not at any time communicate to Larson my intention to so swing around to see this girl; that I thought work stopped at the defendant's at 6 o'clock."

At the close of the testimony the defendant moved for a directed verdict in its behalf on the following grounds: (1) That under the undisputed evidence there was a departure by Finch from his proper course of returning to the defendant's plant; that he went on a personal mission of his own, driving in a direction away from the defendant's premises; that he was intending to go around the block again; that his purpose was to delay in getting back to the place of business so that he would not have to do any more work that day; that he was entirely without the scope of his master's employment, on a personal mission of his own that had no connection directly or indirectly with his duty to his master; (2) on the ground that there was no express or implied authority upon Finch's part to employ or have the services of Larson, and that no emergency existed which made it necessary to have Larson on the car or drive it; (3) that the defendant was in nowise negligent; (4) that upon the undisputed evidence the deceased failed to exercise ordinary care, thereby proximately contributing to his death.

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The court granted the motion upon the first of the above grounds. Upon the verdict so directed judgment was entered dismissing the complaint, from which judgment the plaintiff has appealed.

For the appellant there was a brief by *Whaley & Erikson* of Racine, and oral argument by *Vilas H. Whaley.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Floyd E. Jenkins,* of counsel, all of Milwaukee, and oral argument by *Walter D. Corrigan.*

The following opinion was filed May 3, 1921:

ESCHWEILER, J. Although error was committed in receiving, on defendant's offer, portions of the deposition of Finch taken at plaintiff's instance under sec. 4096, Stats., as we shall discuss later, nevertheless a consideration of his entire evidence satisfies us that it did not warrant the action of the court below.

To relieve a master from liability to third persons arising from a negligent act of the employee on such a ground as contended for by defendant here, the deviation from the master's service must be so substantial as to amount to a departure therefrom and for purposes entirely personal to the servant. *Loomis v. Hollister,* 75 Conn. 718, 55 Atl. 561.

Under Finch's testimony, in proceeding from the place of his last delivery, the junk shop, to defendant's garage, to go along on Center street was the shortest way he knew. Even were Washington avenue the nearer route it was subject to street-car traffic. He had had no express instructions as to the particular streets to travel. In going as he did down Center street, therefore, he was in the exercise of a discretion which must, in the absence of express directions, naturally rest with a driver of such a vehicle, and while in the exercise of such discretion he is manifestly, so far as that feature of it is concerned, still within his master's service. *Mathewson v. Edison E. I. Co.* 232 Mass. 576, 581, 122 N. E. 743; *McKeever v. Ratcliffe,* 218 Mass. 17,

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20, 105 N. E. 552; *Hayes v. Wilkins,* 194 Mass. 223, 80 N. E. 449; *Maloy v. Rosenbaum,* 260 Pa. St. 466, 103 Atl. 882.

The fact that Finch had the purpose of delaying his return to the place of employment in order to avoid being sent out on another errand, a point upon which much stress is laid by defendant, certainly cannot of itself be such a departure from the master's service as to thereby relieve the master. The servant who loiters and thereby fails to render to the master full and honest measure is nevertheless, so far as least as third persons are concerned, as much in the master's employ as he who hastens in his task.

Again it is urged that Finch having, as expressed in certain parts of his deposition, immediately on leaving the junk yard formed the intention to make the detour on Franklin street in order to see the girl who lived there, his trip all the way down, or at least at the time of the collision, became a purely personal adventure and therefore a departure from the master's service. The slight deviation required to go around the three sides of the square between Tenth, Eleventh, Center, and Franklin streets, in view of the length of his journey and the nature of his employment, does not warrant the finding that such was a substantial deviation and therefore a departure from the master's service. Had the young lady resided on Center street between Tenth and Eleventh instead of on Franklin street and the driver had the same intention of driving past her house with the hope of seeing her, and with that intention in mind had been driving down Center street at the time of the accident, such mere purpose surely could not have made his being on Center street at the time in question a departure from his employment. The few moments required to run around on to Franklin street had no more substantial effect on his journey than if he had looked for her on Center street.

In any event, at the time of the injury he was back on Center street and headed in the proper direction towards

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his master's place of employment. He was then in the master's employ. *Graham v. Henderson,* 254 Pa. St. 137, 98 Atl. 870. That he then had an unexecuted purpose of again running around on Franklin street to again try to see the girl was a purpose which he might have abandoned before reaching the point of turning, and being merely an unexecuted, unexpressed mental purpose of his own cannot be deemed a departure from his master's service. *Fitzgerald v. Boston & N. St. R. Co.* 214 Mass. 435, 439, 101 N. E. 1085. As was said under a state of facts which warranted a similar conclusion to that arrived at here in *Ritchie v. Waller,* 63 Conn. 155, 28 Atl. 29, where the deviation is slight and not unusual the court may, as a matter of law, determine that the servant was still executing the master's business; and we say so here.

We have considered the authorities relied upon by defendant's counsel (*McCarthy v. Timmins,* 178 Mass. 378, 59 N. E. 1038; *Healey v. Cockrill,* 133 Ark. 327, 202 S. W. 229; *Crady v. Greer,* 183 Ky. 675, 210 S. W. 167) and others, but we do not deem them as applicable or controlling upon the facts as they appear in this case.

Respondent asserts that the judgment should be supported upon the other grounds presented by it on its motion for a directed verdict, viz. the contributory negligence of the deceased; and that in any event no liability of defendant for the injury arose because Larson, not Finch, was driving. The trial court expressly refused to uphold defendant's contention on such grounds, and we think very properly.

The question of contributory negligence by the boy who was killed was a question for the jury.

The driver, Finch, had received no instructions as to permitting or not permitting any one else than himself to drive the truck. He testified that Larson, who had charge of the operation of the truck at the time of the injury to the boy, was driving in a proper manner and that there was nothing

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that could have been done by either Larson or himself to have avoided the injury.

At the time that Larson had requested and obtained permission to drive the automobile Finch had the purpose of going back on the body of the truck to ascertain if possible what was the trouble with the operation of the truck and also to shift the position of the barrel of oil so that it would be more convenient for removal upon returning to the garage, thereby permitting his more speedy relief from his employment. All of this was within the field of his employment, and Larson was a means used by Finch in carrying it out.

We think, therefore, that for the purposes of this case as the record discloses the situation, Larson, though in a measure a volunteer without expectation of compensation, nevertheless so far as any third person would be concerned was in defendant's employment at the time of the injury. He was fully as much a fellow-servant of Finch and an employee of defendant as was the boy injured by the falling of the heavy machinery on the depot platform in *Wagner v. Plano M. Co.* 110 Wis. 48, 85 N. W. 643, or the bystander assisting in laying of water pipes in *Johnson v. Ashland W. Co.* 71 Wis. 553, 556, 37 N. W. 823. These two cases were expressly recognized as correctly stating the law on such a point in *Johnson v. Berwind F. Co.* 154 Wis. 1, 3, 141 N. W. 1018. A similar result was arrived at in the case of *Geiss v. Twin City T. Co.* 120 Minn. 368, 139 N. W. 611, appearing with note in 45 L. R. A. N. S. 382. See, also, *Prince v. Taylor* (Tex.) 171 S. W. 826.

The respondent relies upon the case of *Thyssen v. Davenport I. & C. S. Co.* 134 Iowa, 749, 112 N. W. 177, 13 L. R. A. N. S. 572, but that case held that the act complained of there was not actionable negligence, which necessarily disposed of the case and made unnecessary any determination on such a question as is here presented.

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Appellant plaintiff alleges in his assignment of errors certain rulings of the trial court in the matter of evidence. He offered to prove certain statements alleged to have been made by Finch at the police station after he had accompanied the policeman from the scene of the injury to the station. These statements could certainly not be considered as part of the *res gestæ* and admissible on that ground, nor had any proper foundation been laid for introducing them by first interrogating the witness Finch, either on his examination under sec. 4096, Stats., or by calling him as an adverse witness upon the trial. The ruling was correct.

A map of Racine upon which it was claimed the witness Finch had marked with lead-pencil on his examination the streets traversed by him was admitted. This ruling was immaterial in view of our holding as to his deposition *infra*.

Plaintiff offered in evidence an affidavit made by Finch about a month after the accident and verified before plaintiff's counsel. This was used by plaintiff's counsel in the examination of Finch under sec. 4096, Stats., and several statements therein contained were read to the witness and he was interrogated concerning them. The affidavit itself, however, was not offered at the time of such examination. There was no foundation therefore laid upon which such affidavit as a whole could be offered as independent evidence, as was attempted to be done by plaintiff, and the court was right in refusing its admission.

Plaintiff read to the jury certain portions of the deposition, taken on his behalf under sec. 4096, Stats., of the witness Finch, defendant's employee, before trial. After plaintiff rested defendant offered as part of his case other portions of such deposition, some of which portions were elicited by the questions of plaintiff's counsel and others in response to defendant's counsel. Upon the portions so offered by defendant relating in substance to Finch's intent and purpose in driving around on Franklin street and as to

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his loitering on the way back to defendant's garage, the trial court predicated its ruling in defendant's favor. Such evidence, therefore, was in substance and effect defensive matter.

There was no showing made that Finch was not present at the trial or could not be produced as a witness. It is not necessary, therefore, that we should rule whether such portions of the deposition as tended to prove the substance of defendant's defense could be properly admitted even were it shown that Finch could not attend as a witness. It was, however, clearly inadmissible as the record then stood.

Prior to the enactment of ch. 246, Laws 1913, the plaintiff himself could not have used the deposition of Finch, defendant's employee, were Finch attainable as a witness (*Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077, decided in 1906); such rule not applying, however, as to parties or the officers of corporations when parties. *J. H. Clark Co. v. Rice,* 127 Wis. 451, 466, 106 N. W. 231.

By the chapter just mentioned there was added to sub. 2, sec. 4096, as it then stood the following:

"Such portions of any such examination or examinations of any of the persons mentioned as are relevant to the issues in the case may be offered by the party taking any such examination or examinations and shall be received upon the trial of the action or proceeding in which it is taken, notwithstanding the person who was so examined may be present at the trial or proceeding."

This evidently was for the purpose of changing the rule as announced in *Anderson v. Chicago B. Co., supra,* but it goes no further.

Neither of the cases cited and relied upon by defendant, of *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467, or *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081, met the present proposition.

The scope and purpose of sec. 4096, Stats., is fully discussed in the case of *Lange v. Heckel,* 171 Wis. 59, 69, 175

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N. W. 788, where it was held that a party who himself had been examined under sec. 4096, Stats., by the adverse party could not properly offer such examination on his own behalf on the trial, there being no showing made that he could not be present to testify. The statute gives no express or implied authority for such use of the deposition as was made by defendant on the trial, nor can we find any support for its reception in any of the decisions. The portions thereof upon which defendant predicated its defense were therefore improperly received.

By the Court.—Judgment reversed, and cause remanded for a new trial.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

STATE EX REL. MCKENZIE and another, Respondents, vs. BROWN, School Clerk, and others, Appellants.

April 8—July 13, 1921.

Schools and school districts: Union free high schools: Validity of proceedings: Approval of state superintendent: Necessity: Certiorari: Time within which action must be brought.

1. The provisions of the law relating to the establishment of union free high schools (sec. 40.47, Stats. 1919) confer no power, nor do they attempt to confer power, upon the state superintendent to review the regularity of the proceedings had pursuant to its provisions, and in that respect sec. 40.47 is the same as sec. 497, Stats. 1915, now a part of sec. 39.01, it being the intent and purpose of the statute to confer upon the superintendent, in the exercise of the supervisory control vested in him by sec. 1, art. X, Const., the power to determine whether or not the educational interests of the community involved will be best served by the incorporation of the proposed high school.
2. A petition in *certiorari* to review a proceeding resulting in the establishment of a union free high school should be quashed where it does not allege that the proceedings were certified

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to or approved by the state superintendent, since such a proceeding results in no determination in the absence of such certification or approval by the state superintendent, *certiorari* lying to review a final determination only.

3. The use of the word "matters" in sec. 1, ch. 184, Laws 1901 (sub. (2), sec. 39.01, Stats. 1919), providing that no review of the decisions of the state superintendent of public instruction on matters decided by him shall be had unless proceedings by *certiorari* or other appropriate action be brought within thirty days after such determination, indicates that it was intended to cover all decisions made by the state superintendent, whether the controversies in which the decisions were made reached him by way of appeal or were instituted before him in the first instance; and *certiorari* to review proceedings resulting in the establishment of a union free high school must be brought within thirty days after the approval by the state superintendent of the proposed school.

APPEAL from a judgment of the circuit court for Polk county: W. R. FOLEY, Circuit Judge. *Reversed.*

Certiorari. It was proposed to incorporate a union free high school, the boundaries of which should include territory lying partly in the towns of Eureka, St. Croix Falls, and Balsam Lake, and including the village of Centuria. The petitioners proceeded under the provisions of sec. 40.47, Stats. An election was held and the result of the election certified to the state superintendent, who issued the certificate provided for in sub. (6) of sec. 40.47. The writ of *certiorari* was taken to review the proceedings which resulted in the establishment of the union free high school. The writ was directed to *T. H. Brown,* school clerk, *N. J. Larson,* director, *Ernest Nelson,* treasurer, of union free high school district of the village of Centuria and towns of St. Croix Falls, Eureka, and Balsam Lake; *Gust Anderson,* village clerk of the village of Centuria; *William Ihrig,* president of the village of Centuria; *Frank Blanding,* chairman, and *F. P. Blanding,* clerk, of the town of St. Croix Falls; *Emil Casperson,* chairman, and *Henry Peterson,* town clerk, of the town of Eureka; *George L. Freeman,* chairman, and *Ray A. Benage,* town clerk, of the town of Balsam Lake.

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In the circuit court the petition was challenged by motion to quash on the ground that it was misdirected, the state superintendent of public instruction not being made a party. The trial court was of the opinion that the union free high school district is not created by the certificate issued by the state superintendent, but that it is created by the election held in the territory to be embraced in the district, and denied the motion. The court held that the proceedings were defective in two particulars: first, that the election was held in the village and not in an outlying territory as provided by the last clause of sub. (4) of sec. 40.47; and second, that three weeks' notice of the election was not given. Judgment was entered wholly reversing and annulling the proceedings leading up to and resulting in the establishment of the union free high school in the village of Centuria and the towns of St. Croix Falls, Eureka, and Balsam Lake, from which judgment the defendants appeal.

For the appellants there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy.*

For the respondents there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

A brief was also filed by *T. M. Holland* of Park Falls as *amicus curiæ* and *M. E. Yager* of Frederic, of counsel, and oral argument by *Mr. Yager.*

The following opinion was filed April 20, 1921:

ROSENBERRY, J. The provisions of the law relating to the establishment of union free high schools (sec. 40.47, Stats.) leave much to be desired in the way of definiteness, completeness, and unity. In the view which we take of this matter it is not necessary to set out the entire statute nor to refer to the many inconsistencies therein which were urged upon us on the oral argument as well as in the briefs.

It is the contention of the defendants that the writ should be quashed for the reason that it is misdirected, in that the

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state superintendent of public instruction is not made a party to the proceeding. This leads to a consideration of the statute, sec. 40.47:

"(1) With the advice and consent of the state superintendent a free high school, to be known as a 'union free high school,' may be established and maintained in any town, or in any tract of contiguous territory having an area of not less than thirty-six nor more than seventy-two square miles and bounded by town, school district, section or half-section lines or by lines bounding in part an existing free high school district, or in cases where impassable streams, lakes or swamps render it impracticable to follow such boundary lines, such natural boundaries may be substituted. . . .

"(6) The result of the election shall be certified at once by the election officers to the clerk of each town and village concerned; and if the proposal be adopted the result shall also be certified to the state superintendent by the respective clerks within six days after the election. If such action meets the approval of the state superintendent he shall issue a certificate of establishment of a union free high school in said tract of territory."

Under the provisions of this statute it is argued that there is vested in the state superintendent the power to exercise a discretion as to whether or not the proposed union free high school shall be established; that the petition does not show that the result was certified to the state superintendent or that he issued the certificate of establishment; and that the matter had not proceeded to a final determination and hence the writ should not have been issued.

If the law vests in the state superintendent no discretion, it is difficult to discover the legislative intent in requiring the organization to be with the advice and consent of the state superintendent and his approval to be evidenced by the issuing of a certificate of establishment. The provisions of sec. 40.47 confer no power, nor do they attempt to confer power, upon the state superintendent to review the regularity

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of the proceedings had pursuant to its provisions. Assuming that such authority might constitutionally be conferred upon the state superintendent, no such power is conferred by sec. 40.47, and in that respect it is the same as sec. 497, now a part of sec. 39.01. *State ex rel. Schuette v. Cary,* 143 Wis. 83, 126 N. W. 562; *State ex rel. Moreland v. Whitford,* 54 Wis. 150, 11 N. W. 424; *State ex rel. Bidgood v. Clifton,* 113 Wis. 107, 88 N. W. 1019.

It is the intent and purpose of the statute to confer upon the state superintendent, in the exercise of the supervisory control vested in him by sec. 1, art. X, of the constitution, the power to determine whether or not the educational interests of the community involved will be best served by the incorporation of the proposed union free high school. Manifestly the corporation cannot come into existence unless and until the state superintendent shall evidence his approval in the manner prescribed by statute, otherwise his advice and consent might be rendered nugatory; for, the corporation once being in existence, the state superintendent could not revoke its powers or suspend its charter. The act, then, by means of which the corporation comes into existence is the decision or determination of the state superintendent. While his decision does not, strictly speaking, create the corporation, the legislature has conferred upon him the power to determine whether or not the proceedings taken under the statute shall operate to create a corporation.

The petition does not allege that the proceedings were certified to or approved by the state superintendent. The proceeding attempted to be reviewed by the writ is therefore one which has resulted in no determination and hence it is not reviewable under a writ of *certiorari,* which lies to review a final determination only. 11 Corp. Jur. p. 126, § 75, and cases cited. As was said in *Mayor, etc. v. Fordyce,* 88 N. J. Law, 440, 97 Atl. 67, *certiorari* cannot be used to draw judicial opinions in advance. The matter under re-

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view must have terminated in a final order. *Gauld v. Board of Supervisors,* 122 Cal. 18, 54 Pac. 272.

It appears from the return that the proceedings were certified to the state superintendent and that he did issue the certificate of establishment as provided in sub. (6), sec. 40.47. If we consider the petition amended so as to show this undisputed fact, the matter may not then be reviewed by *certiorari* because of the limitation provided in sub. (2), sec. 39.01:

"No review of the decisions of the state superintendent on matters decided by him shall be had unless proceedings by *certiorari* or other appropriate action be brought within thirty days after such determination by him," etc.

This provision was first enacted as ch. 184, Laws 1901. As now arranged, it might well be construed as applying to decisions on matters brought to the state superintendent pursuant to the provisions of sub. (1), sec. 39.01. The use in the original statute of the word "matters" is significant, and by that we think it was intended to cover all decisions made by the state superintendent, whether the controversies in which the decisions were made reached him by way of appeal or were instituted before him in the first instance. A review of the statutory provisions relating to the creation of municipal and *quasi*-municipal corporations shows that the legislature has endeavored to set matters relating to the validity of the organization of such corporations at rest at as early a period as possible, and in consequence has provided by statutes of limitation a brief period in which such matters may be reviewed. The construction which we place upon the statute is in accord with the general legislative purpose.

By the Court.—Judgment of the circuit court reversed, and cause remanded with directions to quash the writ.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

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ROHLOFF and others, Appellants, vs. FOLKMAN and others, Respondents.

April 8—July 13, 1921.

Motion for severance: Discretion of court: Order granting severance not appealable.

1. The power of the court to order a severance of causes of action rests in its sound discretion, which will not be disturbed, when exercised, unless there is a manifest abuse thereof; and although an order sustaining a demurrer for misjoinder of causes of action would, under secs. 2649, 2686, Stats., have practically the same result, an order requiring a severance cannot for that reason be treated as in effect an order sustaining a demurrer, and is therefore not appealable under sec. 3069.
2. Where several causes of action are pleaded, the court in its discretion may order a severance.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Dismissed.*

For the appellants there was a brief by *Umbreit, Mahon & Clark* of Milwaukee, attorneys, and *A. C. Umbreit* of Milwaukee, *J. H. McGillan* of Green Bay, and *A. M. Andrews* of Shawano, of counsel; and the cause was argued orally by *A. C. Umbreit.*

For the respondents there was a brief by *Otto L. Olen* of Clintonville, attorney, and *Miller, Mack & Fairchild* of Milwaukee and *P. H. Martin* of Green Bay, of counsel; and the cause was argued orally by *Edwin S. Mack.*

The following opinion was filed May 3, 1921:

ROSENBERRY, J. The complaint alleges that each of the plaintiffs was a stockholder of the Four Wheel Drive Auto Company; that the defendants other than Calkins were or are directors of the company; that each of the plaintiffs was induced to sell his respective stock holdings in the said com-

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pany to a certain person, designated one of the defendants in each case, through fraudulent concealment by the defendants acting in conspiracy, and the relief prayed for is a rescission of each of the sales and an accounting for the stock purchased and its proceeds. There was brought on for hearing on February 28, 1921, a motion of the plaintiffs to amend the complaint by adding H. J. Calkins as a party defendant and to add to the complaint allegations with respect to said H. J. Calkins. At the same time a motion made by the defendants to dismiss the complaint for misjoinder of causes of action, or, in the alternative, to sever the causes of action, was heard. The motion of the plaintiffs to join H. J. Calkins and for amendment of the complaint with reference to him was denied. The motion of the defendants to dismiss was denied, but the motion to sever was granted, the order providing:

"It is further ordered that the said motion of the defendants for severance of the causes of action of the several plaintiffs be and the same hereby is granted, and that the alleged cause of action of each of the plaintiffs set forth in the complaint shall be, and hereby is, constituted as a separate action, and the said several causes of action hereby are severed and made distinct and separate causes of action, and that the complaint already served herein shall as to each of the plaintiffs stand as and for his separate complaint," permission being given for the necessary amendments.

From this order the plaintiffs appealed, claiming that the motion to sever was equivalent to a demurrer and that the order directing severance is, in substance and legal effect, an order sustaining a demurrer and should be so treated, being analogous to a motion to supersede a writ of *certiorari* or a motion to quash an alternative writ of *mandamus,* which are held to be, in effect, demurrers. *State ex rel. Bidgood v. Clifton,* 113 Wis. 107, 88 N. W. 1019; *State ex rel. South Range v. Tax Comm.* 168 Wis. 253, 169 N. W. 555; *State ex rel. Mueller v. Thompson,* 149 Wis. 488, 137 N. W. 20.

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It is pointed out that under sec. 2649, Stats., a misjoinder of causes of action is ground for demurrer and that the order entered is that prescribed by sec. 2686, where a demurrer for improper joinder of causes of action is sustained. It is, in effect, conceded that unless the order directing a severance is, in effect, an order sustaining a demurrer, it is not an appealable order. It is argued that sec. 2654 expressly provides that a failure to object to a misjoinder of causes of action in the manner provided by statute waives the question. *Harrigan v. Gilchrist,* 121 Wis. 127 (99 N. W. 909), at p. 278; *Jenks v. Allen,* 151 Wis. 625 (139 N. W. 433), at p. 628.

The motion to dismiss the appeal is based upon the claim that the order appealed from is not one of the class of orders described in sec. 3069 relating to appealable orders.

The power of the court to order a severance of causes of action is well recognized. It may not be demanded as a matter of right, but rests in the sound discretion of the trial court, which, when exercised, will not be disturbed unless there has been a manifest abuse of the discretion. 1 Corp. Jur. p. 1141, § 369 *et seq.* and cases cited. The argument of plaintiffs' counsel amounts to this: That if a complaint be demurrable by reason of the misjoinder of causes of action and the defendant does not demur, the trial court may not thereafter order a severance in the exercise of sound discretion, although the court might, in the exercise of its discretion, direct a severance if a complaint were not demurrable. We see no reason why the power of the trial court should be so limited and we are cited to no authority sustaining such a proposition. A demurrer to a complaint raises a question of right. A motion to sever causes of action is an appeal to the discretion of the trial court, and while the results may be, as argued, substantially the same, they are in law two distinct things. We cannot, therefore, treat

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the motion to sever as a demurrer. An order directing a severance is not appealable under the provisions of sec. 3069.

By the Court.—Appeal dismissed.

ESCHWEILER, J., dissents.

A motion for a rehearing was denied, with $25 costs, on July 13, 1921.

BEILFUSS and others, Respondents, vs. DINNAUER, Appellant.

May 3—July 13, 1921.

Gifts: Confidential relation between parties: Presumption: Burden of proof: Consideration: Resulting trusts: Violation of trust: Witnesses: Confidential communications: Disclosure to attorney.

1. Where an aged widow mortgaged her own property and gave the funds thereby secured to the defendant, her son-in-law, who purchased therewith incumbrances on property belonging to the estate of her husband and certain unsecured notes signed by the husband, and thereafter, in the course of the administration of the husband's estate, the widow, as administratrix, conveyed the real estate owned by her husband in his lifetime to the defendant, who in fact paid no consideration therefor, the defendant is bound in subsequent proceedings by the widow's heirs, where he claimed that the transaction was a gift, to show that there was no abuse of the trust and confidence reposed in him, and in the absence of such evidence it will be presumed that there was no valid gift.
2. Where the heirs claimed that defendant held the lands in trust, but he asserted a gift on the part of the widow, and further set up that, as she was ineligible to purchase the land, neither she nor her heirs could question his title, *held* that, while sec. 2077, Stats., declares that when a grant for a valuable consideration shall be made to one person and the consideration paid by another no use or trust shall result, but title shall vest in the person named, yet, as sec. 2079 declares that sec. 2077

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shall not extend to cases where the alienee shall have taken the same as an absolute conveyance in violation of some trust, defendant cannot, where he failed to establish the gift, deprive the heirs of their right to recover the property.

3. Under the circumstances, defendant took title as trustee for the widow, and under the evidence in the case it is *held* that he was not entitled to the same on the theory that it was a gift.
4. Under sec. 4076, Stats., declaring that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him as attorney, after the death of his client he is incompetent to testify to information given by the client, and, though such testimony was admitted without objection, it will be presumed to have been disregarded by the trial court, and will be disregarded on appeal.

APPEAL from an order and a judgment of the circuit court for Milwaukee county: EDGAR V. WERNER, Judge. *Affirmed.*

Charles Beilfuss, Sr., died intestate in 1908 and left his widow, Julia, and ten adult children, the latter parties to this action. For a long time prior to his death, he, his wife and family, occupied a farm of 100 acres in the town of Oak Creek, Milwaukee county. The dwelling was located upon eighty acres, title to which was in the wife, Julia. The adjoining twenty acres were in his name. He left no other property save the twenty acres and these were incumbered with mortgages to secure notes amounting to about $2,550 with interest. He also was indebted on unsecured promissory notes of about $800. His wife, Julia, had signed all these notes.

Several of the unmarried children continued to live with the mother on the 100 acres after as before the death of the father. One of the daughters, Ella, had married the defendant *Peter Dinnauer* many years before, but owing to differences that had arisen between *Dinnauer* and Mr. Beilfuss, Sr., some fifteen years before, he, *Dinnauer,* had not been permitted to call at the Beilfuss home during such period; Mrs. Beilfuss, however, frequently called at his

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house. Immediately after the decease of Mr. Beilfuss, Sr., the defendant *Dinnauer,* living but a short distance away, at the request of or at least with the cordial consent of the widow continued to call frequently at the Beilfuss house, where he advised with the widow as to her affairs and particularly with reference to disputes that arose between other members of the family then living at the farm.

The widow desired to make some arrangement with reference to the then incumbered twenty acres, and as a result of a consultation with an attorney at law to whom she had been taken by defendant *Dinnauer* she made petition in January, 1910, for appointment as administratrix of her deceased husband's estate.

February 24, 1910, Mrs. Beilfuss, through a loan on her eighty acres of $4,300, took up an indebtedness then outstanding on her property and turned a balance of $3,450 over to the defendant *Peter Dinnauer,* who deposited it in his name in a bank. Immediately thereafter and with this money, he having no means of his own, the mortgages then outstanding against the twenty acres were purchased by him and assignments thereof taken. He also bought the unsecured notes.

Mrs. Beilfuss was appointed administratrix in March, 1910.

June 10, 1910, she made her will, subsequently admitted to probate, wherein she appointed the defendant executor and divided all of her property, real and personal, in substantially equal shares among the ten children, except that as to the shares of three of them certain deductions or additions were directed to be made.

In October, 1910, a petition was prepared on behalf of defendant *Dinnauer* by the same attorney who had represented the widow as administratix, for an extension of the time for filing claims. The time was extended, and in December defendant *Dinnauer* filed a claim for the obliga-

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tions of the defendant so purchased by him as aforesaid, and upon the hearing, *Peter Dinnauer* appearing by another attorney, his claims were allowed by the court, Mrs. Beilfuss expressly consenting thereto. At about the same time a petition was made by Mrs. Beilfuss for an order authorizing the sale of the twenty acres to pay the debts of the estate, and the usual proceedings were had upon such petition. On April 6, 1911, the twenty acres were sold, the sale being conducted on the premises and by the same attorney for Mrs. Beilfuss and to defendant *Dinnauer,* he being the only bidder, for $3,025, being a sum which was just about sufficient to pay these obligations of Charles Beilfuss, Sr., and the expenses of administration. No money at any time passed between *Peter Dinnauer* and Mrs. Beilfuss on account of such sale, and it was closed by the execution of mutual receipts between the administratrix and *Dinnauer.*

The sale was confirmed by the county court on April 13, 1911, and the widow then executed and delivered two deeds of the twenty acres to the defendant *Dinnauer,* one in her capacity as administratrix and the other a quitclaim as an individual, and they were both immediately recorded.

On April 29, 1911, the defendant gave a mortgage on the twenty acres for $1,000. This was subsequently increased in March, 1914, to $1,300. The widow at no time knew of the giving of such mortgages.

No possession of the twenty acres was assumed by the defendant *Dinnauer* at any time during the lifetime of the widow, and she, with other members of the family, continued to reside there and to conduct and manage the farm made up of her own eighty acres and this twenty-acre piece as one.

In May, 1916, the widow desired to enter into a proposed lease with a third person for the entire 100 acres, and, she then knowing of the two deeds to *Peter Dinnauer* being recorded, his consent was deemed necessary. He declined

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to sign a written lease at the rate then proposed, his sole objection being that he thought it was not sufficient, but he did consent to a verbal lease for one year of the twenty acres at an agreed rental, with the express understanding that the entire rental should be paid to Mrs. Beilfuss.

Within a few days after such transaction and on May 20, 1916, Mrs. Beilfuss died suddenly, then sixty-eight years old. Objections were interposed by certain of her children to the appointment of the defendant as executor under her will. The appointment, however, was made and he qualified as such.

November 2, 1916, this equitable action was commenced by certain of the children of Mrs. Beilfuss as plaintiffs against the defendant *Peter Dinnauer,* his wife, Ella, and one son, Charles Beilfuss, whose whereabouts had been unknown for a number of years.

The complaint recited substantially the facts as above set forth and alleged that the purchase by *Dinnauer* of the twenty acres was made pursuant to an agreement that he should thereafter reconvey the same to her, and alleged his subsequent refusal so to do; that the relationship between the two was such that she placed great trust and confidence in him and that he influenced and directed her to carry out the transaction outlined above.

Defendant demurred to such complaint, which demurrer was overruled after hearing before the Hon. OSCAR M. FRITZ, circuit judge. From the order so overruling the demurrer the defendant has also appealed.

The defendant thereupon answered, asserting in substance that the widow had on numerous occasions requested the defendant to purchase the twenty acres and to live thereon, being desirous to have her daughter Ella and defendant near her during her last years. That upon being informed by defendant that he was financially unable to purchase the twenty acres, she then told him she wanted to

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make a gift to him of a sum of money sufficient for him to purchase the twenty acres, and that she desired this not only because of her affection for him and his wife but because of the aid and assistance he had given her from time to time with reference to her affairs.

Defendant then further alleged that the said widow informed him that she had been advised by counsel that the most expeditious way to secure title in *Dinnauer* of the twenty acres was to have a sale under the direction of the county court, and that she would give him a sufficient amount of money to purchase the outstanding incumbrances on the twenty acres and pay the expenses of administration of the estate. He alleged also the mortgaging by her of her eighty acres and that out of the proceeds of such loan the sum of "$3,450 was then and there delivered to this defendant as a gift with which to purchase the aforesaid notes and mortgages executed by the said Charles Beilfuss, Sr., and wife, which were then a lien upon the said twenty acres of land, in order that the defendant might purchase said land on administrator's sale."

He also alleged a subsequent agreement between himself and the widow that in view of the fact that he was not ready to improve the twenty acres the widow might cultivate the same in consideration of her paying the taxes that might be levied and assessed thereon. That up to her death the widow was of sound mind and in good physical condition, the relationship between her, her daughter Ella, and the defendant was cordial, that he assisted her in the conduct of her affairs, and at no time did she request a conveyance to her of the twenty acres or a desire to revoke the aforesaid gift or ever intimate that she believed she retained any interest or right therein. Defendant also counterclaimed upon the same grounds as asserted in his answer to have his title cleared of any adverse claim by plaintiffs.

Lengthy findings of fact were made by the trial court

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covering with considerable detail the transactions between the parties. He found, among other things, in substance, that the widow desired to keep the twenty acres for herself and children and that there was an understanding and agreement between her and the defendant *Dinnauer* that he should bid in and purchase the twenty acres at the auction sale, provided outsiders did not bid a higher price, for her benefit, and that he was subsequently to reconvey to her. That in such transaction and in the advancing of the money she relied upon and reposed trust and confidence in defendant and was persuaded that it was for the best interests of the estate and that such proceedings would avoid the expense of a foreclosure action and prevent delay in getting possession of the twenty acres. That in all this she was without any knowledge or intent that her acts or conduct might or would be constructively fraudulent and that the defendant was at all times conscious and had full knowledge of the fact that he was acting in a trust capacity and that the widow believed and relied upon him and expected him to convey the twenty acres to her. That there was no consideration whatever passing from the defendant to the widow for a conveyance of the title to the said twenty acres to him. That *Dinnauer* never took possession in any way prior to the death of the widow and she continued in full possession and control, paid the taxes thereon, and conducted herself as and believed herself to be the owner of the twenty acres. That defendant took undue and unconscionable advantage of the trust and confidence the widow reposed in him, and that through his influence over her he secured the deed of the twenty acres and that such was a gross violation of the trust and a constructive fraud upon the widow. That there was no gift of money or of notes and mortgages or the twenty acres from Julia W. Beilfuss to defendant.

As conclusions of law, that the defendant had failed to overcome the presumption arising from the confidential

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relationship between the two and that the alleged gift must be deemed void, that a trust was impressed upon the money, the notes and mortgages, and the land purchased by him, and he was required to give and deed and convey the twenty acres to plaintiffs and the defendants other than himself, and in default of clearing the $1,300 mortgage a personal judgment for such amount be granted and the counterclaim of the defendant be dismissed.

From such judgment as well as from the order overruling the demurrer to the complaint the defendant *Peter Dinnauer* has appealed.

For the appellant there was a brief by *Pereles, Strouse & Carter,* attorneys, and *W. H. Bennett,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Nathan Pereles, Jr.,* and *Mr. Bennett.*

Joe H. Liesenfeld and *Frank J. Kusta,* both of Milwaukee, for the respondents.

ESCHWEILER, J. The answer of the defendant admits, and the testimony clearly discloses, a close confidential relationship between a widow of advanced years with a large family in which there was constant trouble, and her son-in-law, a man of mature years, and with whom she, immediately after the ending of the estrangement between the two families by the death of her husband, assumed a very cordial relationship. No subsequent steps appear to have been taken by Mrs. Beilfuss with reference to her property affairs except and unless after consultation with defendant *Dinnauer* and apparently also without the advice of the other members of the family, and it is to an attorney who was also the advisor of *Dinnauer* that Mrs. Beilfuss went in order to be advised as to the proceedings to be taken to save the equity in this twenty acres, for some purpose.

It being conceded in this case that no valuable consideration passed as between the defendant *Dinnauer* and Mrs.

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Beilfuss, either at the time of his receiving the substantial sum of money from her realized from the mortgage of her own property or at the time of the execution of the two deeds by her as administratrix and individually, respectively, a situation was presented in which the law has declared with emphasis that the burden is upon the beneficiary of such a transaction or series of transactions to satisfactorily and clearly show, when challenged, that there was no abuse by him of the trust and confidence so evidently reposed in him by such donor. *Armstrong v. Morrow,* 166 Wis. 1, 163 N. W. 179; *Patulski v. Bellmont Realty Co.* 166 Wis. 188, 164 N. W. 841; *Dupont v. Jonet,* 165 Wis. 554, 558, 162 N. W. 664; *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144.

Unless the testimony does clearly establish that no advantage was taken of the relationship between the two, that it was open and above board, fair and legitimate, and in all respects the voluntary transaction of the donor, the presumption that there is no valid gift must stand and the transaction be held void.

It is strenuously argued by appellant that where, as in this case, the deceased, Mrs. Beilfuss, as administratrix being disqualified both by statute and public policy from becoming the purchaser of the real estate of her deceased husband and having executed a deed of the same as administratrix and in her individual capacity, and having subsequently in the administration proceedings, upon the confirmation of sale and by her verified report, alleged that she had no interest in the purchase, neither she in her lifetime nor the plaintiffs as her heirs could or can now successfully question but that title was absolutely vested in defendant by such deeds.

Reliance is also placed upon sec. 2077, Stats., which reads as follows:

"When a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid

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by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

Appellant asserts that under the most favorable view of plaintiffs' case it amounts to the taking of title by *Dinnauer* of lands, the purchase price for which was advanced by another, Mrs. Beilfuss, and therefore by virtue of such statute the title vested absolutely in *Dinnauer* and cannot be questioned.

We think, however, these contentions were properly overruled by the trial court. The defendant by his pleadings and through the proceedings predicates his defense upon the assertion that there was a *bona fide* gift of personal property, namely, the money, by means of which the outstanding claims against the estate of Charles Beilfuss, Sr., were purchased by defendant and as a result of which the conveyances were made to him, and unless, therefore, he can successfully show a valid gift to him of this money he is without the purview of said sec. 2077, *supra,* for the reason that he is within the last excepting clause to said section as found in sec. 2079, Stats., which reads as follows:

"Section 2077 shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."

If, therefore, he was unable successfully to assert a gift of this money to him, he necessarily stood charged as trustee on behalf of Mrs. Beilfuss as to this fund and with the proceeds thereof in whatsoever form they may be traced into his hands, for there is no middle ground.

We are satisfied that there is sufficient justification in the record for the conclusion arrived at by the trial court that

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there was no valid gift of the money realized by Mrs. Beilfuss from the mortgage of her own property to the defendant *Peter Dinnauer*.

It is true one witness testified that when applying to Mrs. Beilfuss for a lease of the 100 acres she told him that *Mr. Dinnauer* would have to sign for the twenty acres, that she had given them to him. Another, that during the proceedings in the county court in the probate of the estate of her husband Mrs. Beilfuss stated that she was going to give the defendant *Dinnauer* the twenty acres, that she wanted him to work the farm because he had small children, but was going to give him the twenty acres right out straight, and that this was because he did all the work that had to be done and that any time she called for work he attended to it for her. And another, to whom she said that she gave the twenty acres to *Dinnauer* because he helped her out with the land.

These conversations, however, were all with reference to the twenty acres and not to the gift of money upon which the defendant based his rights herein. The effect of these statements, if made, is qualified or limited by the undisputed facts that Mrs. Beilfuss remained in possession during all the time, paid the taxes, conducted the farm, and received the proceeds without question on *Dinnauer's* part. There was evidence of statements alleged to have been made by the defendant himself in the presence and hearing of Mrs. Beilfuss and some of her children after the sale of the twenty acres in which he stated that he had that day purchased them for her benefit.

Although the record is silent as to the value of her eighty acres, yet it is a fair presumption that the sum turned over to *Dinnauer* and now claimed by him amounted to quite a substantial proportion of her entire estate, and no very powerful reasons are shown why the son-in-law should be so preferred over his wife and the other children of Mrs.

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Beilfuss, who were all on substantial equality under her will. The defendant has failed to show any adequate consideration for the transfer to him of such a sum of money.

Great reliance is placed by appellant upon the testimony of the attorney at law who represented Mrs. Beilfuss as the administratrix in the probating of her husband's estate and who was permitted to testify, without any objections being interposed, as to statements made to him by Mrs. Beilfuss during the relationship of attorney and client and with reference to this particular transaction, and to the effect that she, Mrs. Beilfuss, wanted *Dinnauer* to have these twenty acres, intended to make a gift of it to him; and that she had consulted with him, the attorney, in reference to the proper proceedings to take in order to effectuate such a purpose, and had expressed to him entire satisfaction with the proceedings when taken and the result apparently attained.

Although all this testimony was received without objection being made, it was nevertheless inadmissible because a clear violation of sec. 4076, Stats., which reads as follows:

"An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment."

It is manifest that had the action been brought by Mrs. Beilfuss in her lifetime to set aside the deeds in question it would have been a breach of the statute for the court to have permitted the attorney to testify as a witness for defendant to the information received by him from Mrs. Beilfuss in the course of his confidential professional relationship, and of course it can be no more properly received in this action after her death than if offered in her lifetime. The purpose of the statute is to seal the lips of the attorney as to communications made to him in good faith when seeking his professional advice in any and all matters outside of those which are to aid in a criminal intent or to

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violate the law. To exclude such evidence so forbidden by the public policy of this state is a rule of judicial propriety. *Getzlaff v. Seliger,* 43 Wis. 297, 302.

Such testimony, therefore, has no proper place in the consideration of this case and will be presumed to have been disregarded by the court below, and must be here.

That the judgment of the court below can and should be upheld on the grounds above stated, renders it unnecessary to consider any other questions presented. It follows as matter of course that the demurrer to the complaint was properly overruled.

By the Court.—Judgment and order overruling demurrer each affirmed.

VALERIO, Appellant, vs. WOODMEN OF THE WORLD, Respondent.

May 4—July 13, 1921.

Insurance: Fraternal benefit associations: Authority of agents: Oral contract of insurance.

Sec. 1977, Stats., providing, among other things, that whoever solicits insurance on behalf of an insurance company for a commission or other consideration shall be deemed the agent of the company to all intents and purposes, but that this shall not apply to agents of licensed fraternal beneficiary societies, and sub. 1 and 9, sec. 1956, defining fraternal benefit societies and excluding them from the operation of statutes not expressly designating such societies, do not confer authority on an agent of a foreign fraternal benefit society to make an oral contract of present insurance prior to delivery of the written policy. *McKnelly v. Brotherhood of American Yeomen,* 160 Wis. 514, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The appeal is from a judgment reversing the judgment of the civil court of Milwaukee county.

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The complaint, among other things, alleges in substance, and the evidence shows, that on June 7, 1919, the agent of the defendant represented to plaintiff's husband that upon the payment of a premium of $3 and monthly payments thereafter in the sum of $1.85 the company would insure him for the sum of $1,500, the insurance to be payable to the plaintiff in the event of death and to become effective on the date of the application. An application was then submitted to the husband of the plaintiff, which he signed, but which he did not and which he was unable to read, and which was not read to him. The $3 premium was paid at the time of the signing of the application. The husband, as a result of an injury received by accident, died on or about July 3, 1919, and shortly thereafter the agent who solicited the insurance called on the plaintiff and stated to her that the insurance was not effectual because her husband had not signed the policy. He also left on the dresser in the plaintiff's room the sum of $3, the amount paid by the husband at the time of the making of his application for insurance, which amount the plaintiff refused to accept.

The answer of the defendant admits the application for insurance, and alleges that the application provided for a beneficiary certificate in the defendant, a duly incorporated fraternal benefit association organized and existing under the laws of the state of Nebraska and duly licensed to transact business within the state of Wisconsin; that the husband submitted to a physical examination, and that the beneficiary certificate was accepted by the defendant on or about the 24th day of June, 1919; and that on June 27, 1919, the beneficiary certificate was issued to said husband of the plaintiff, wherein and whereby it was provided that if said plaintiff's husband, while in good standing, should die within one year after becoming entitled to participate in the beneficiary fund, said defendant would pay to the above named plaintiff the sum of $500; if her husband should die within two years

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after becoming entitled to participate in said fund, the sum of $750; and that if such death should occur after the expiration of two years, then said defendant would pay to said plaintiff the sum of $1,000. That said certificate on its face provided and was issued subject to all the conditions indorsed thereon and of the constitution and by-laws of said defendant then existing and to all amendments which might thereafter be made thereto.

That the third provision indorsed on said certificate provided as follows:

"Third. There shall be no liability of the Sovereign Camp of the *Woodmen of the World* under this certificate until the member named herein shall have paid one entrance fee, one advance assessment or instalment of assessment of Sovereign Camp fund and camp general fund dues for the month, signed his beneficiary certificate and the acceptance slip attached thereto, paid the physician's fee for examination, been obligated or introduced by a camp or authorized deputy in due form and had manually delivered into his hands in person this benefit certificate while in good health. The foregoing provisions are hereby made a part of the consideration for, and are conditions precedent to, the payment of benefits under this certificate."

The answer further alleged that at the time of the application of plaintiff's husband as aforesaid, and at the time of the issuance of said certificate, there was in full force and effect a certain by-law duly adopted, published, and circulated among the membership of said defendant which provided as follows:

"Section 58. The liability of the Sovereign Camp for the payment of benefits on the death of a member shall not begin until after his application shall have been accepted by a sovereign physician, his certificate issued, and he shall have: 1. Paid all entrance fees. 2. Paid one or more advance annual assessments and dues or one or more advance monthly instalments of assessments and dues, known as Sovereign Camp fund; also signed his certificate and acceptance slip

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attached thereto. 3. Paid the physician for medical examination. 4. Been obligated or introduced by a camp or by an authorized deputy in due form. 5. Had delivered to him, in person, his beneficiary certificate while in good health.

"The foregoing are hereby made a part of the consideration for, and are conditions precedent to, the liability for the payment of benefits in case of death."

The answer further alleges that plaintiff's husband has never paid all entrance fees; has not paid any advance annual assessments and dues or any monthly instalment of assessments and dues; that he has not signed said certificate nor the acceptance slip attached thereto; that he has not been obligated or introduced by a camp or an authorized deputy in due form; and that said certificate has never been delivered to said Henry Valerio in person; and that the undelivered certificate is in the possession, unsigned by said Valerio, of the defendant, with the unsigned acceptance slip thereunto attached.

The civil court found, among other things:

a. That the defendant is a foreign mutual life insurance corporation.

b. That on June 7, 1919, the agent of the defendant solicited insurance of the husband of the plaintiff, and stated to the plaintiff and agreed with the plaintiff that such insurance would commence at once, and that the husband of the plaintiff would be insured immediately upon the payment of $3 premium, and that such insurance would be for the sum of $1,500.

c. That the husband relied upon such representations made by defendant's agent, paid the premium, and agreed to take said insurance.

d. That plaintiff's husband was unable to read or write the English language; that he did not read the application; and that such application was not read to him.

e. That the insurance was payable to the plaintiff.

f. That the husband died on June 12, 1919.

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g. That the defendant has failed and refused to pay the sum of $1,500 as insurance.

h. That the plaintiff refused to accept the return of $3 premium paid by her husband.

i. That there was a valid present contract of insurance on the life of the plaintiff's husband, of which the plaintiff was beneficiary.

j. That upon the death of the husband of the plaintiff the plaintiff became entitled to the sum of $1,500 upon said contract of insurance.

Thereupon the civil court ordered that judgment be entered in favor of the plaintiff and against the defendant for the sum of $1,500 and interest, etc., and judgment was thereupon accordingly entered and docketed in said civil court.

From such judgment of the civil court the defendant appealed to the circuit court, where, after a hearing upon the record of the cause transmitted by the civil to the circuit court, the judgment of the civil court was reversed and plaintiff's complaint dismissed, with costs.

The cause was submitted for the appellant on the brief of *Ray J. Cannon,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee, and for the respondent on that of *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, all of Milwaukee.

DOERFLER, J. The evidence, in substance, sustains all the allegations as above set forth and contained in the answer of the defendant. It is clear from an examination of the record herein that the defendant at all times was and is a fraternal benefit society, and not, as found by the civil court, a foreign mutual life insurance corporation.

There was no contention made at the trial that the plaintiff's husband had prior to his death complied with the provisions of the constitution and by-laws of the defendant, a

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compliance with which is made a condition precedent to the payment of any benefit under a certificate.

Plaintiff relies upon the decisions in the cases of *Northwestern Iron Co. v. Ætna Ins. Co.* 23 Wis. 160; *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; *Mathers v. Union Mut. Acc. Asso.* 78 Wis. 588, 47 N. W. 1130, and other cases, which hold that a valid parol agreement to insure may be made without delivery of a written policy, provided the terms are definitely fixed.

In *Northwestern Iron Co. v. Ætna Ins. Co.* 23 Wis. 160, it was held:

Such an "action might be sustained, providing it appeared that the agents of the company had authority to make the parol contract of insurance relied on. . . . If the agents of the company were fully authorized to make the contract set out in the complaint, we know of no satisfactory reason why a recovery may not be had upon it."

The *Northwestern Iron Company Case* was decided by this court in the year 1868, and in 1871 the legislature passed ch. 13 of the laws of said year, which among other things provided:

"Whoever solicits insurance on behalf of any fire, marine, inland, life or accident insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance, to or from said company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes, unless it can be shown that he receives no commission or other compensation or consideration for such service."

The foregoing enactment was incorporated in the Revised Statutes of 1878 as sec. 1977, and also in S. & B. Ann. Stats. 1889 under the same section number.

In 1891, in the case of *Mathers v. Union Mut. Acc. Asso.* 78 Wis. 588, 47 N. W. 1130, the decision, among other things, contains the following language:

"The general and almost unlimited powers of all insur-

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ance agents doing business in this state are sufficiently expressed in the statute. Sec. 1977, R. S."

This section is then set forth in the terms as above stated, and the court thereupon continues in its decision, and says:

"The meaning of this language could not be made clearer by construction or comment. All insurance companies understand that all of their agents doing business in this state are *general* agents, however restricted their powers may be by the rules of the companies, or by the stipulations or conditions of their policies or of the applications for insurance. The only act of the agent here that the company disclaims and repudiates is contracting for a *present* insurance."

And it was held in that case that an oral contract for present insurance, made by the agent of an accident association, is binding upon such association under the provisions of sec. 1977, R. S., as it then existed, although the application signed by the person to be insured contained a provision that the association should not be liable for any injury happening prior to the receipt and acceptance of the application and member's fee by the secretary and general manager, and the policy subsequently issued bore date two days later than the oral agreement. It does not, however, appear from the report of the latter case whether the company was a fraternal benefit society.

In the year 1905 (ch. 353, Laws 1905) sec. 1977 was amended by adding at the end thereof the following:

"This section shall not apply to agents of licensed fraternal beneficiary societies, or mutual fire insurance companies of this state except those organized under section 1896, 1897 and 1898."

Ch. 216, Laws 1911, was thereupon enacted and was incorporated in our statutes as secs. 1956 and 1957.

Sub. 1, sec. 1956, Stats., provides:

"Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members or their beneficiaries, and

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having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of death or disability benefits, or for both, is hereby declared to be a 'fraternal benefit society,' which shall be held to be synonymous with a 'mutual benefit society.' . . ."

Sub. 9, sec. 1956, provides:

"*Exemption from general laws.* Unless express reference is made to this subsection or unless expressly designated therein, no law now in force or hereafter enacted, shall apply to any fraternal benefit society or mutual benefit society."

It is correctly said in the learned decision of the circuit judge:

"There is no reference in sec. 1977 to sec. 1956. While one legislature cannot bind or control successive legislatures, laws amending, modifying, or limiting the scope of application of laws passed by a preceding legislature are valid. If sec. 1977, by its terms, contained no limitation whatever, it could not apply to fraternal benefit societies because of the language of sec. 1956. But sec. 1977 does contain a limitation. It specifically provides that 'this section shall not apply to agents of licensed beneficiary societies,' and there is no limitation to societies organized in this state, as claimed by the plaintiff."

This case is ruled by the case of *McKnelly v. Brotherhood of American Yeomen,* 160 Wis. 514, 152 N. W. 169. The Statutes of Kansas on the subject are substantially like our own and contain what is known as ch. 23 of the Laws of 1898, incorporated as a part of sec. 4303, Stats. 1909, and which provides as follows:

"Such association [meaning the fraternal benefit society] shall be governed by this act and shall be exempt from the provisions of other insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Quoting the above statute, Mr. Chief Justice WINSLOW in the opinion of the court then says:

"Now, while one legislature cannot control its successors as to the manner in which they shall legislate, this provision

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is nevertheless very significant as an indication of legislative policy, and its continued existence unrepealed is fairly persuasive proof that the policy there expressed has been and still is adhered to. Taken in connection with the clear indications on the face of the sections themselves, we are convinced that they were not intended to apply and do not apply to certificates issued by fraternal beneficiary societies."

By the Court.—The judgment of the circuit court is affirmed.

WILL OF ALLIS: THE STATE, Appellant, vs. ALLIS and another, Respondents.

May 5—July 13, 1921.

Inheritance taxation: Life insurance payable to wife: Premiums paid by person other than insured: Power of legislature to tax: Evidence: Presumption as to who paid premiums.

1. Under sub. (7), sec. 1087—1, Stats. (added by Laws 1915, ch. 253), making insurance payable on the death of the insured subject to inheritance taxes, the intention of the legislature was to include only such life insurance as the insured personally effects on his own life for the benefit of others and on which he pays the premiums.
2. Under sec. 2347, Stats. (providing that one effecting insurance on his own life or on the life of another may make the policy payable or assign it to a married woman and that it shall be her sole and separate property, and in case of her surviving the term of the policy the amount shall be payable to her free from the control, disposition, or claims of her husband), and ch. 15, Laws 1903 (providing that she may, with the written consent of the insured, assign or dispose of the policy), the rights of a wife as a beneficiary under a policy effected by her husband on his own life are contingent on her surviving the term of the policy. The insured retains a substantial interest in the policy which does not pass until his death, and the proceeds are properly subjected to inheritance taxes by sub. (7), sec. 1087—1, Stats.
3. The legislature has the power to levy inheritance taxes by the exercise of the power of reasonable regulation and taxation of the transfer of property.
4. If a husband insures his life for his wife's benefit and pays premiums thereon, he transfers property to her, in legal effect

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the transaction being the same as a gift. The transfer of property to the beneficiary, which becomes consummated at the time of the death of the insured, may be taxed by the legislature.

5. Lack of direct evidence as to who paid the premiums on policies of life insurance necessarily leads to the presumption that the insured complied with the terms of the policy and paid the premiums.

ESCHWEILER, J., dissents.

APPEAL from an order of the county court of Milwaukee county: M. S. SHERIDAN, Judge. *Reversed.*

The appeal is from an order determining the inheritance tax due upon the estate of Charles Allis, deceased.

Charles Allis died July 22, 1918. At the time of his death there was insurance upon his life in the sum of $306,000 of which *Sarah E. B. Allis* was sole beneficiary. The estate consisted of real and personal property. The value thereof for inheritance-tax purposes was fixed by the county court at $377,718.27, subject to deductions amounting to $106,691.82, leaving the clear market value of the estate subject to the inheritance tax $271,026.45. Three of the policies in question were payable in a lump sum at the date of death of the deceased, while six were payable in monthly instalments.

The executors of the will of the deceased and *Sarah E. B. Allis* individually interposed an objection to the court's considering the insurance as part of the estate for the purpose of determining the inheritance tax, for the following reasons: (1) Because the interest of *Sarah E. B. Allis* was fully vested in all the policies before the passage of sub. (7), sec. 1087—1, Stats., and by virtue of sub. (4), sec. 1087—1, is not subject to the inheritance tax. (2) If the insurance in question is not exempt from the tax, then the law is invalid in so far as it attempts to tax life insurance which vested prior to the passage of ch. 253, Laws 1915, for the reason that the legislature cannot impose an inheritance or

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transfer tax upon estates or property which vested prior to the enactment of the law imposing the tax. (3) Because ch. 253, Laws 1915, if construed so as to impose a tax on the insurance in question, is unconstitutional because (a) it violated sec. 1, art. VIII, Wisconsin constitution, providing that the rule of taxation shall be uniform, and (b) it violates sec. 1, art. I, of the Wisconsin constitution and the Fourteenth amendment to the federal constitution, in that it denies to *Sarah E. B. Allis* the equal protection of the law and deprives her of her property without due process of law.

The county court held that no inheritance tax was due on account of the life insurance, and determined that the entire estate pass to *Sarah E. B. Allis,* widow of the deceased. Appeal is taken from this order.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *John Harrington,* inheritance tax counsel, and oral argument by *Mr. Brossard* and *Mr. Harrington.*

For the respondents there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Paul R. Newcomb* and *J. G. Hardgrove,* all of Milwaukee.

SIEBECKER, C. J. The legislature in 1915 (ch. 253) amended sec. 1087—1, Stats., relating to inheritance taxes, by adding sub. (7) providing:

"Insurance payable upon the death of any person shall be deemed a part of his estate for the purpose of the tax, and shall be taxable to the person or persons entitled thereto."

It is the claim of the *State* that all life insurance maturing upon the death of the person insured is properly subject to the tax prescribed in sec. 1087—1, Stats., upon the ground that the proceeds of such insurance policies can be treated by legislative action for the purposes of such taxation the same as the decedent's estate is treated, and that the payment of such proceeds to the beneficiaries can be made subject to

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inheritance taxation upon the principle that transfers of property by will, or by the intestate laws of this state, or by deed or grant, intended to take effect in possession or enjoyment at or after such death, are taxable. It is common knowledge that life insurance is usually effected by the insured on his life for the benefit of another and that he pays the premiums. In recent times life insurance effected by a person other than the insured for the benefit of the person effecting it and who pays the premiums has become established in business affairs. The latter class of life insurance creates relations between the parties to the contract materially different from those created by insurance of the former class. We are of the opinion that the legislature intended that ch. 253, Laws 1915, was to include only such life insurance as the insured effects on his own life for the benefit of another and on which he pays the premiums.

The conflicting rights asserted by the *State* and the widow of Mr. Allis make it necessary to consider the rights and interests of the insured and the beneficiaries in life insurance policies under the laws of this state. It is to be observed, as stated in *Boehmer v. Kalk,* 155 Wis. 156, 144 N. W. 182, by the late Mr. Chief Justice WINSLOW, that:

"Since a very early day it has been held in this state that one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy, or may will it away without the consent of the beneficiary." Citing *Clark v. Durand,* 12 Wis. 223, and *Armstrong v. Blanchard,* 150 Wis. 31, 136 N. W. 145.

In *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378, the court adverted to this fact as peculiar to the law of this state and said:

"In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the states. This principle is that a person who insures his own life for the

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benefit of another, and pays the premiums thereon, may [except a limitation by statute as to a married woman] dispose of the policy by will or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein."

In *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948, wherein a gift of a policy was sustained as a valid one, it was noted that "Such a policy is not to be distinguished from ordinary choses in action, and comes within the operation of the legal rules applicable to agreements involving pecuniary obligations" (citing). In *Slocum v. Northwestern Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796, a son and daughter of the insured as beneficiaries sued the company for damages on the ground that the company wrongly breached and terminated the policy. It is there held that such beneficiaries in the policy could not maintain the action. In speaking of the nature of the rights of beneficiaries under the general law it was there declared:

"While such a right is a vested one it is in its nature a mere 'expectancy,' which is subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured. The uncertainty of the beneficiary's interests, growing out of the contingencies incident to the power of the insured to thus deal with the policy, renders the rights and interests of the beneficiaries too hypothetical to be made the ground for damages for a breach of the contract. It is a mere expectancy of an unascertainable value and hence cannot be made the basis of a claim for damages. Under the law of this state the rights of the insured in such a contract are valuable property rights, and for a deprivation thereof the insured is entitled to recover the damages as for other wrongful deprivations of valuable property rights."

This court characterized a husband's act in effecting life insurance on his life for the benefit of his wife and daughters in *Farr v. Trustees, etc.* 83 Wis. 446, 53 N. W. 738, in

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these terms: "The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death."

We repeat these observations defining the rights of parties to an insurance policy in the law of this state because they are fundamental to a determination of the questions presented on this appeal. The contention of defendant is that *Mrs. Allis,* the beneficiary of these policies and the widow of the insured, became vested with the proceeds of these policies at the time of their issuance and that there was no transfer of property to her within the contemplation of the inheritance tax laws of this state at the time of the insured's death, and hence no succession tax can be levied. The inquiry as to the rights of *Mrs. Allis* under these policies under the terms of sec. 2347, Stats., is a pertinent one. This statute, among other things, provides that:

"Any person, whether her husband or not, effecting any insurance on his own life or on the life of another may cause the same to be made payable or assign the policy to a married woman or to any person in trust for her or her benefit, and every such policy . . . shall be the sole and separate property of such married woman and shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors."

In *Given v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 71 Wis. 547, 37 N. W. 817, the court relied on the rule adopted in *Foster v. Gile,* 50 Wis. 603, 7 N. W. 555, 8 N. W. 217, and held that if a policy of insurance does not designate to whom the insurance shall be paid in case the beneficiary named dies before the insured, the appointment of the beneficiary is revoked by such death and the insurance inures to the benefit of the estate of the insured. In *Ellison v.*

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Straw, 116 Wis. 207, 92 N. W. 1094, sec. 2347, Stats., is discussed at length, and it was declared that the dominant purpose of the whole course of legislation embodied in this section ". . . has been to provide, not for married women, but for widows, and that the full scope thereof cannot be effected other than by holding a married woman powerless to in any manner, directly or indirectly, assign insurance made for her benefit; . . . that the statute . . . preserves the insurance to the end that, in case of her surviving the insurance period, it may then be payable to her for her own use and benefit." This decision was made in January, 1903. In March, 1903, the legislature passed an act enabling a married woman, with the written consent of the person effecting such insurance, to assign, incumber, or dispose of any right, title, or interest she may have in a policy of life insurance on her life, her husband's life, or other person's, as if she were unmarried, thus clearly recognizing the fact that the insured has an interest in such a policy. From the history of the legislation and the decisions of this court from an early day it is manifest that, if a married woman is named as the beneficiary in a policy effected by her husband on his own life, her rights to the fund constituting the proceeds of the policy are contingent upon the event that she survive the term of the policy, and if she does not survive her husband and leaves no children surviving, then the proceeds are a part of the husband's estate unless another beneficiary is designated in the policy. It is thus seen that the husband retains a substantial interest in such a policy. All the policies in this case matured upon Allis' death. But it is argued by respondents that the rights of the widow became vested when she was made the beneficiary of the policies, and therefore there is no transfer of property or of any interest therein from the husband to his widow as the beneficiary of the policies at the time of his death within the terms of the inheritance tax law. This claim is predicated on the ground that the policies were her sole and separate property and

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that she is vested with absolute ownership thereof. This, we consider, is not the legal effect of her appointment as beneficiary. As heretofore indicated, the policies are property under the law in which the insured retains an interest, and her interests as beneficiary and widow were not absolutely vested in her until his death. Her interests in the policies and their proceeds were joined with his interest until the contingency of her surviving him had happened. Under such circumstances it must follow that a transfer of his interest in these policies took effect at the husband's death and that she, in law, had not an absolute but a qualified ownership of the policies and their proceeds before his death. The nature and quality of such beneficial interest in these policies during the insured's life constitute a good ground for legislative action to subject the proceeds realized therefrom to inheritance taxation upon the basis that they "shall be deemed a part of his estate for the purpose of the tax, and shall be taxable to the person or persons entitled thereto." It is not essential that such proceeds shall become a part of the deceased husband's estate upon his death in order to subject them to inheritance taxation. It is self-evident that by means of these policies the husband transferred a large part of his estate to his widow, which became effective at his death; this puts the transaction within the field of inheritance taxation. As declared in the case of *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, the legislature has the undoubted power to levy inheritance taxes by the exercise of the power of reasonable regulation and taxation of the transfer of the property. *State v. Pabst,* 139 Wis. 561, 121 N. W. 351; *Estate of Ebeling,* 169 Wis. 432, 172 N. W. 734.

In addition to the foregoing considerations, it is manifest that this insurance fund in the hands of the widow is within the field of inheritance taxation even if it were considered that the husband's interests had been transferred to his

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widow before his death under the terms of the insurance contract. Such a transaction would, in substance, be a transfer of his property to her and constitutes in legal effect a transfer of the same kind as is accomplished by a gift. It must be borne in mind that the statute provides: "Insurance payable upon the *death* of any person shall be deemed a part of his estate for the purpose of the tax." Here we have a plain declaration that such a transfer which was intended to take effect in possession or enjoyment when the husband died shall be subjected to the tax, upon the ground that the widow in fact came into possession and enjoyment of this property from him at his death. As stated in the *Ebeling Case,* "Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos,* they are not beyond the power of the legislature to tax." As above indicated, the result of buying these policies by the husband is that he in a proper and legal sense transferred to his widow a substantial part of his estate, and that such transfer became consummated in possession and enjoyment at the time of his death and hence is one which the legislature had the power to tax.

These considerations place the statute beyond the objections and claims of the respondents to the effect that the life insurance received by the widow can in no sense be considered estate in which the husband had no interest; that there is no succession to or transfer of the property within the field of inheritance taxation; or that the property is not taxable because the widow's rights became fixed and vested before the passage of ch. 253, Laws 1915, and that the act violates the Fourteenth amendment to the federal constitution by denying to the widow the equal protection of the law or depriving her of her property without due process of law.

It is contended that there is no direct evidence to show that the husband paid the premiums on the policies in ques-

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tion. We think the lack of direct evidence on the subject necessarily leads to the presumption that he complied with the terms of the policy and paid the premiums. In the light of the foregoing considerations it follows that the county court erred in not taxing the proceeds of these policies as prescribed by sub. (7), sec. 1087—1, Stats.

By the Court.—The order appealed from is reversed, and the cause remanded to the county court of Milwaukee county with direction to enter an order directing that the insurance fund in question be subjected to the inheritance tax under the law in accordance with this opinion.

The following opinion was filed October 3, 1921:

ESCHWEILER, J. (*dissenting*). As to the insurance policies taken out prior to the passage of the amendment to the inheritance tax law under consideration in this case and which insurance policies became payable to the wife beyond any possibility of control by the husband, she surviving, I think they became her property as to him, and she thereby then acquired such a vested interest in those policies as to place it beyond the power of the legislature, by merely declaring it to be something which it is not, to make it subject to the inheritance tax.

STATE EX REL. JACKSON, Defendant in error, vs. REID, Plaintiff in error.

May 7—July 13, 1921.

Appeal: Order adjudging contempt: How appeal taken: Contempt in proceedings under unconstitutional statute.

1. An order adjudging one guilty of contempt is appealable, under sec. 3069, Stats. It is not an order, under sec. 3043, from which a writ of error lies, and hence its validity should be tested by appeal.

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2. Ch. 16, Laws 1920 (Special Session), known as the Rent Law, having been declared unconstitutional by this court (*State ex rel. Milwaukee Sales & Inv. Co. v. Railroad Comm., ante,* p. 458), all proceedings under it are void, and the circuit court should reverse its order adjudging defendant guilty of contempt for refusal to answer questions in a proceeding thereunder.

ERROR to review an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Writ quashed.*

Writ of error brought to test the validity of an order of the circuit court for Milwaukee county in a civil contempt proceeding adjudging defendant guilty of contempt because of his refusal to answer certain questions in a proceeding under ch. 16, Laws 1920 (Special Session), known as the "Rent Law."

For the plaintiff in error there was a brief by *Rose & Sloan* of Milwaukee, and oral argument by *David S. Rose.*

For the defendant in error there was a brief by the *Attorney General, Ralph M. Hoyt,* deputy attorney general, and *J. F. Baker,* assistant attorney general; and the cause was argued orally by *Mr. Hoyt* and *Mr. Baker.*

VINJE, J. The order is an appealable one. Sec. 3069, Stats. 1919; *Vilter Mfg. Co. v. Humphrey,* 132 Wis. 587, 112 N. W. 1095. It is not an order under sec. 3043, Stats. 1919, from which a writ of error lies, hence its validity should have been tested by appeal and not by a writ of error. The writ gives us no jurisdiction and must therefore be quashed. *Ogden v. State,* 162 Wis. 500, 156 N. W. 476.

Since ch. 16, Laws 1920 (Special Session), is unconstitutional (see *State ex rel. Milwaukee S. & I. Co. v. Railroad Comm.,* decided herewith (*ante,* p. 458, 183 N. W. 687), it follows that all proceedings under it are void, and the circuit court should reverse its order and discharge the defendant.

By the Court.—Writ quashed.

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KUETHER, Respondent, vs. THE STATE, Appellant.

May 31—July 13, 1921.

Divorce: Division of estate: Modification of judgment: Jurisdiction of court: Trusts: Construction of decree: Appeal: Opinion on extraneous points to avoid further litigation.

1. A final decree in a divorce action dividing the property between the husband and wife cannot be modified after the term at which it was rendered; the right of a wife to alimony ceases upon the death of the husband; and a judgment for support money terminates when the children become of age. Hence, whether a decree of divorce granted in 1869 is construed as a judgment for alimony or one of final division, the court, on the application of the wife in 1919, was without jurisdiction to modify the judgment, the husband and children being dead.
2. Where the original decree awarded property to the wife in trust for herself and children and she thereafter secured a modification which awarded the property to her in terms absolutely, and the state, claiming the property by way of escheat, the husband having died, challenged such modification, the supreme court may, for the purpose of terminating the litigation, construe the original decree, though the modification was void.
3. While the words "in trust" or "for trust," used in a conveyance, will, or decree, suggest a purpose to create a trust, they are not conclusive of such intent.
4. Where the statutes relating to divorce in 1869, the time the decree was entered, authorized the court to make a final division of property, but did not authorize a decree that property given to the wife should be held in trust either for her benefit or for that of her children, a decree declaring that real estate of the husband assigned to the plaintiff wife was in trust for herself and the minor children of the marriage must be deemed to vest the absolute title in the wife, the words "in trust," as used in the decree, not creating a trust, but expressing the idea that title to the real estate was vested in the wife to enable her to support the children.

APPEAL from an order and a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Reversed.*

In 1869 the county court of Milwaukee county entered

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a decree of divorce in the above entitled action containing this provision:

"And it is further adjudged and decreed, that of the real estate owned by the defendant the following piece or parcel of land, situate, lying and being in the county of Milwaukee and state of Wisconsin, and known and described as lot No. 3, in block No. 7, in Wm. P. Young's Addition, in the Sixth ward of the city of Milwaukee, together with the dwelling house and appurtenances thereon, be and the same is hereby assigned to the plaintiff, *Emilie Johanne Caroline Sophie Kuether,* in trust for herself and the said minor children of the plaintiff and defendant. To have and to hold the same unto the said plaintiff in trust for herself and said minor children."

There were three children, Franz, Emilie, and Juliane. Emilie and Juliane died in 1873. In 1885 Franz quitclaimed to his mother any interest which he may have had in the real estate, and died in April, 1886. In the summer of 1886 the defendant Johann Hermann Gottlieb Kuether died, not having previously remarried, and leaving no kin.

In January, 1919, the circuit court for Milwaukee county (having succeeded to the jurisdiction of the county court of that county in such matter by virtue of ch. 125, Laws 1887, and ch. 1, Laws 1903), upon the application of plaintiff, modified the provision above quoted by inserting in lieu thereof the following:

"That of the real estate owned by the defendant, the following piece or parcel of land, situate, lying, and being in the county of Milwaukee and state of Wisconsin, and known and described as lot numbered 3, in block numbered 7, William P. Young's Addition, in the Sixth ward in the city of Milwaukee, together with the dwelling house and appurtenances thereon, be, and the same is hereby assigned to the plaintiff, *Emilie Johanne Caroline Sophie Kuether,* now Trettin, absolutely, and the title in fee thereof is hereby divested from the defendant and transferred to the plaintiff absolutely."

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And further adjudged as follows:

"It is further adjudged and decreed that the title in fee of the premises so described is hereby divested from the children of said plaintiff and of said defendant, now deceased, and from any and all persons claiming under them or any of them, and from the state of Wisconsin, and said title in fee is transferred and vested in said plaintiff absolutely."

From such order and judgment modifying the original decree the *State of Wisconsin,* claiming the estate of Johann Hermann Gottlieb Kuether as an escheat, brings this appeal.

For the appellant there was a brief by the *Attorney General* and *Ralph M. Hoyt,* deputy attorney general, and oral argument by *Mr. Hoyt.*

Arthur A. Mueller of Milwaukee, for the respondent.

OWEN, J. The power of the court to modify the original decree in the manner attempted by the order and judgment appealed from is most effectually challenged. A judgment of final division of estate between husband and wife cannot be modified after the term at which it was rendered (*Blake v. Blake,* 75 Wis. 339, 43 N. W. 144; *Gallager v. Gallager,* 101 Wis. 202, 77 N. W. 145; *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651; *Zentzis v. Zentzis,* 163 Wis. 342, 158 N. W. 284; *Towns v. Towns,* 171 Wis. 32, 176 N. W. 216), and an attempt to retransfer the real estate after such final division is without jurisdiction. *Thompson v. Thompson,* 73 Wis. 84, 40 N. W. 671. While a judgment for alimony may be modified at any time as long as it is in effect (*Lally v. Lally, supra; Von Trott v. Von Trott,* 118 Wis. 29, 94 N. W. 798; *Zentzis v. Zentzis, supra*), the right to alimony ceases absolutely upon the death of the husband. *Yates v. Yates,* 165 Wis. 250, 161 N. W. 743; *Lally v. Lally, supra; Maxwell v. Sawyer,* 90 Wis. 352, 63 N. W. 283; *Campbell v. Campbell,* 37 Wis. 206. It also ceases upon the death of the wife.

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Steinkopf v. Steinkopf, 165 Wis. 224, 161 N. W. 757. And a judgment for support money for minor children terminates when the children become of age. *Boehler v. Boehler,* 125 Wis. 627, 104 N. W. 840. The divorced husband and all of the children being dead, the court was without jurisdiction to modify the original decree in the manner attempted, whether it be construed as a judgment for alimony or one of final division.

While this necessitates a reversal of the order and judgment appealed from, we are urged to construe the original decree, thereby determining the status of the title to the real estate involved in so far as it is affected by the original decree entered herein. It is manifest that a controversy exists between the state and the plaintiff concerning the title to this property which must be determined by an authoritative construction of the original decree entered herein. Litigation looking toward such a construction is inevitable. This will be avoided by an expression of our views upon the subject at this time. Although a discussion of the matter is not necessary to a disposition of the present appeal, we feel constrained to give the matter our consideration, to the end that further litigation may be avoided.

It is to be noticed that by the terms of the original decree the real estate therein mentioned was assigned to the plaintiff, *Emilie Johanne Caroline Sophie Kuether,* "in trust for herself and the said minor children of the plaintiff and defendant." It is contended on the part of the *State* that the decree did not vest the plaintiff with the absolute title to the real estate and that nothing more than a trust was created. There is much discussion in the brief of the *State* as to the nature of the trust, and limitations are set upon the extent of the title which plaintiff can now claim upon various contingencies assumed.

We shall confine our inquiry to the question whether the court, by the language used, intended to create a trust at all.

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Should this question be answered in the negative, it will be unnecessary to consider the character of the trust or the limitations which it imposes upon plaintiff's present title.

While the words "in trust" or "for trust" used in a conveyance, will, or decree suggest a purpose to create a trust, yet they are not conclusive of such an intent. *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201; *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258. In the latter case it was said:

"Of course, the presence or absence of words declaring an estate to be in trust is not conclusive, though they may be more or less significant of the purpose in the grantor's mind. . . . The question is whether the testator's intent involved the elements of a trust as known to the law."

And in *Will of Dever,* 173 Wis. 208, 180 N. W. 839, it is said:

"We are also impressed with the thought that where a testator says he gives 'in trust' or 'upon trust,' but makes no attempt to prescribe the terms or purposes of the trust, a court may well pause and consider whether it was really the intention of the testator to create a trust in the legal sense."

Under the circumstances, the words "in trust" in the original decree give rise to an ambiguity, and in order to discover the judicial intent it is permissible to refer to the facts and circumstances disclosed by the record as well as the authority of the court in the premises. We should presume that the court intended to act within the scope of its authority and not to exceed it.

The divorce was granted on the ground of habitual drunkenness and cruel and inhuman treatment. The property of the defendant consisted of the lot here in question, with an adjoining lot, some household furniture, a number of cows and chickens, and certain promissory notes. The entire estate amounted to $3,500, according to the court's finding. The statutes relating to divorce at the time the decree was entered authorized the court to make a final division of the

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property owned by the husband. *Donovan v. Donovan,* 20 Wis. 586. The statute did not in express terms authorize the real estate to be conveyed in trust for the wife; but conceding, for the purposes of the argument, that the power to vest the wife absolutely with the title to a portion of the real estate authorized the court to convey the same in trust for her benefit on the theory that the power to convey the entire title included the power to convey a portion thereof, yet we are confronted with the fact that the statute did not authorize the court to convey the real estate or any other property belonging to the plaintiff to or for the benefit of the children. So far as the decree attempted to vest in the children any right or title to the real estate involved, if it did so attempt, it was without question beyond the power of the court. The court committed the care and custody of the minor children to the plaintiff, and the plaintiff owned no property in her own right. When we consider that this divorce was granted on the ground of habitual drunkenness, that the defendant was found incompetent and unfit to have the care and custody of the minor children, and that the plaintiff owned no separate estate, we must conclude that the court intended by that provision of the decree under consideration to provide as far as possible for the support and maintenance of the plaintiff and her minor children, acting in such respect within the authority conferred by law. While the decree states in terms that the real estate is vested in plaintiff in trust for herself and minor children, it does not say for how long the trust is to last, nor what shall become of the property upon the termination of the trust. There is nothing to indicate a judicial intent that the real estate mentioned in the decree should ever revest in the defendant. We see no reason to doubt the purpose of the court absolutely to divest the defendant of title to the property in question. When we reflect that the court had no power to create a trust in favor of the children, and it is very

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doubtful if any power existed to create a trust in favor of the wife; that it was the purpose to provide for the support and maintenance of the plaintiff and the children; that it was within the clear power of the court to make a final division and distribution of the estate between the parties; that it was the purpose to completely divest the defendant of all title, we come rather clearly to the conclusion that the words "in trust" as used in the original decree were not used with the purpose of creating a trust in any legal sense, but rather to express the idea that the title to the property was vested in the wife to enable her to discharge the duties and responsibilities in the matter of the support and maintenance of the children which the decree cast upon her, and that a proper construction of the decree vests in the plaintiff the absolute title to the real estate therein described. A similar decree was thus construed in *Simpson v. Simpson,* 80 Cal. 237, 22 Pac. 167.

We therefore think that the court erred not only in assuming power to modify the original decree, but in assuming that by the entry of the order and judgment appealed from the original decree was in any respect modified. In other words, in our judgment the original decree vests in the plaintiff the absolute title to the property as fully as would be accomplished by the order and judgment appealed from if within the jurisdiction of the court to make.

By the Court.—Order and judgment reversed, and cause remanded with directions to dismiss plaintiff's petition.

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LA COCO, Appellant, vs. MASSEY STEAMSHIP COMPANY, Respondent.

May 31—July 13, 1921.

Admiralty: Injury to stevedore: Concurrent jurisdiction of state and admiralty courts: Negligence in unloading vessel: Anticipation of injury.

1. Though a suit against the owner of a vessel for injuries sustained by a workman while assisting in unloading it for the consignee might have been brought in the admiralty court, a state court, administering common-law remedies, had concurrent jurisdiction where no remedy against the vessel was claimed.
2. Where there was no structural defect in the vessel when turned over to the consignee of the cargo for unloading, the owner was not bound to anticipate that the unloading would be carried on by the consignee or the stevedores employed by it in so unusual a manner as to cause injury to its employees.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Action for damages for personal injuries. Trial in the civil court of Milwaukee county resulted in judgment for plaintiff upon a special verdict. Upon appeal to the circuit court judgment was reversed and the complaint was ordered dismissed. Plaintiff appeals.

Appellant was a laborer who had for many years worked in and about ships and docks. Respondent was the owner of the ship "Tioga," upon which the injury occurred.

The "Tioga" was a steel or iron ship, formerly a package freighter, but recently converted into a gross freighter for the carrying of such commodities as coal. She had been a two-decked vessel, the lower deck separating an upper from a lower hold. There were large hatchways in the upper deck for the purpose of admitting the clam-shell scoops used for unloading. Those parts of the lower deck which came under these hatchways had been removed so that the clam-shells could be lowered to the bottom of the hold. The

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lower deck was made of metal plates resting upon a metal framework, and when the opening was made under the hatchway in question a part of the deck was left projecting like a shelf inward from the wall of the vessel to a point under the edge of the hatchway. Along the edge of the projecting plate beneath this hatchway a piece of partly rounded metal had been fastened and formed what was described as a coaming. It was riveted to the under side of the plate and flush with its edge. Respondent intended to remove the lower deck the coming winter and reconstruct it.

On June 20th the boat was inspected at Buffalo by the government inspectors and passed as in full compliance with the laws and regulations of the inspection service. The coal company which conducted the unloading operations did so at a dock which had not been used for two years, there was some trouble with the unloading machinery, and the operating personnel was assembled hurriedly, three of the four operators of the hoisting clams being inexperienced. There was testimony that in unloading coal ships the clams, which in this case weighed three tons, occasionally struck the sides of the hatchways and would then rebound and strike the opposite sides. With this particular unloading there was an unusual amount of this striking, and the foreman had warned men in the hold to be careful as there were inexperienced hoisters on the job. Appellant denied having heard the warning.

Appellant was working upon the unloading operations in the hold underneath the lower deck and near the hatchway which has been described. About ten or fifteen minutes before the accident a fellow workman had noticed that the iron coaming which caused the injury was loose at one end, and he changed his place of work to avoid danger from it. Appellant was assisting the lowering of the clam, and when it struck the bottom of the hold the iron coaming fell upon him causing injuries.

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It is admitted that respondent is not liable for any active negligence in the unloading operations, but it is contended that the lower deck with the iron coaming constituted a structural defect negligently permitted to exist which made the hold an unsafe place to work.

For the appellant there was a brief by *Ray J. Cannon,* attorney, and *A. W. Richter,* of counsel, and oral argument by *L. A. Schweichler,* all of Milwaukee.

Martin J. Brennan of Milwaukee, for the respondent.

JONES, J. This action was brought and was tried by both parties on the theory that it was a common-law action subject to the jurisdiction of the state court, and no remedy against the vessel was claimed. Although the suit might have been brought in the admiralty court the state court administering common-law remedies had concurrent jurisdiction. *Georgia C. Co. v. American M. Co.* 169 Wis. 456, 172 N. W. 148.

The jury found that the iron coaming on the second deck rendered the hatchway an unsafe place for persons to work, that respondent was negligent in permitting this unsafe condition, that this negligence proximately caused the injury, and that appellant was not guilty of contributory negligence. After the usual motions the trial judge gave judgment for appellant upon the theory that there was evidence to support the finding that the place was not reasonably safe because of the manner in which the iron coaming was fastened to the second deck. The circuit court, however, concluded that there was no testimony that the ship was unsafe when turned over to the unloaders, but that the injury was due entirely to the operations of the latter.

It will be seen that the real issue submitted to the jury as to defendant's negligence was whether the coaming rendered the hatchway an unsafe place to work. The principal argument now made by appellant is that the boat was struc-

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turally defective because part only of the second deck had been removed. It was the undisputed testimony that the coaming was for the purpose of strengthening the ship and protecting the remaining part of the lower deck from knocks which might be given by the clams and also for protecting the cables by which the clam was operated from being cut by the edge of the plate. The testimony showed that after the accident it was found that the iron was in good condition but torn apart and that the rivet holes were torn and that the rivets of a piece of the coaming were torn through the plate. The testimony was that when the boat was inspected the coaming was in good condition, including the bolts and rivets. After the inspection the boat came over a quiet sea to Toledo, where it was loaded with fine soft coal by means of a long spout and pump which in no manner had the effect of loosening the coaming or making it unsafe. After being loaded the boat started upon its trip to Milwaukee, where it landed on the night of June 26, 1919. Nothing was done after leaving Buffalo to impair the coaming between that time and the time when she was docked in Milwaukee. After docking in Milwaukee the boat with its cargo was turned over to the Kanawha Fuel Company. The defendant had nothing to do with the unloading of the boat.

The evidence showed that it was the custom, when boats were changed by removing part of the deck, to have a coaming for the protection of the boat, and that in careful operation the clam seldom strikes the sides of the hatchway. It is conceded by appellant that defendant was in no way responsible for the acts of the Kanawha Fuel Company nor for the acts of the stevedores who unloaded the boat or any of the employees of the company. On the contrary they predicate liability solely upon a structural defect in the boat. There is no evidence whatever that the coaming was not in perfect condition until ten or fifteen minutes before the accident happened. There is ample evidence that after the

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defendant delivered the boat to the fuel company there was such improper management by the employment of inexperienced employees and the use of imperfect hoisting appliances as might loosen the coaming and cause the injury complained of. The defendant was not bound to anticipate that the unloading would be carried on in so unusual a manner as to damage the boat or cause injury to the employees of the fuel company.

The views already expressed are decisive of the only question relating to defendant's negligence which was litigated or passed upon by the jury. It is urged by appellant's counsel that the removal of a part of the lower deck left the boat structurally defective and left the hold an unsafe place to work; but we find no testimony which supports such a claim.

By the Court.—Judgment affirmed.

ASHBY, Respondent, vs. ASHBY, Appellant.

May 31—July 13, 1921.

Divorce: Judgment for alimony: Limitation of actions: Laches: Modification of judgment: Imposing charge on homestead.

1. As a judgment for alimony is a continuing judgment, always subject to modification by the court during the life of the parties, the statute of limitations (sub. (1), sec. 4220) does not apply.
2. Where a divorce judgment awarded the wife $10 a month as alimony, but the husband, after paying the alimony for a few years, made no further payments for forty-four years in reliance on the advice of his attorney, the rights of the wife were not lost by reason of her passivity and inaction during that time; but, the husband having become old and infirm and incapable of earning a livelihood by his own personal efforts and having accumulated only a small amount of property, the judgment should be so modified, in view of the changed and altered circumstances, as to award to the wife a reasonable amount in lieu of past-due alimony.

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3. Under sec. 2367, Stats., providing that when alimony shall be adjudged to the wife the court may provide for payment at such times as shall be deemed expedient and impose it as a charge upon any specific real estate of the party liable, the court may impose a charge or lien for past-due alimony on the husband's real estate, whether it be a homestead or not.

APPEAL from an order and a judgment of the circuit court for Winnebago county: CHESTER A. FOWLER, Judge. *Reversed.*

The appeal is from an order directing appellant to pay twenty years' arrears of alimony and interest thereon, amounting to the sum of $3,922.30, with costs, the original judgment having been entered on April 20, 1871.

The judgment for divorce provided for a dissolution of the marital ties upon the ground set forth in plaintiff's complaint, namely, wilful desertion, and it also adjudged that the custody of the minor child of the parties, Charles Morris Ashby, be awarded to the plaintiff, and that the defendant pay to the plaintiff the sum of $10 per month, payable monthly, as alimony; and that such alimony shall commence on the date thereof.

It appears also that the allowance for alimony provided for by said judgment was paid until July, 1874; that in September, 1876, the defendant, being then in arrears in the payment of alimony, was ordered by said court to show cause why he should not be punished for contempt for failure to pay alimony under said judgment; that said matter duly came on for a hearing before the court; that the court refused to punish the defendant for alleged contempt, and that the petition of the plaintiff was dismissed. That after the determination by the court of said application to punish the defendant for contempt, the defendant was assured by his attorney, one James Freeman, that he would not be obliged to pay any further attention to the payment of alimony under said judgment, and that thereafter he paid no further attention to such judgment until the year 1920, when

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an application was made by petition in the above entitled action in said circuit court, wherein the plaintiff prayed for an order to show cause directing said defendant to appear before said circuit court and show cause, if any he have, why all unpaid instalments of alimony under the original judgment and further accruing instalments should not be paid, and why the defendant should not be punished for failure to pay the alimony so adjudged, and for such other and further relief as the court, under all the circumstances, might deem just and equitable.

In and by this petition of the plaintiff it is stated that the minor child of the parties was born in October, 1870; that since July, 1874, the defendant failed and refused to pay the alimony provided for by the original judgment; that a formal demand for the payment of the alimony in arrears was made of defendant, in writing, on January 21, 1920, at Winneconne, Winnebago county, Wisconsin, which was the place of defendant's residence and where he has continued to reside since said decree of divorce was entered; that there was due plaintiff from the defendant on January 21, 1920, for alimony the sum of $5,460; that the infant child of the parties was an invalid and lived with the plaintiff and was supported by her until he was twenty-eight years of age, when he died; that the plaintiff, ever since the divorce was granted, was the owner of no property and had no income excepting such as she was able to secure by menial labor, and that with her earnings and some outside aid she eked out a miserable existence during all those years; that by a former husband petitioner had a daughter, who married a man by the name of Hamilton, who resided in South Dakota, and that both the daughter and her husband were impecunious, but aided and assisted the plaintiff to the best of their ability. That the plaintiff is now seventy-five years of age, and physically unable to perform labor or to earn money in order to provide the necessities of life; that she

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is reduced to penury and want; that she was obliged to remove to South Dakota and live with her daughter and son-in-law in order to secure their aid and support.

Upon such petition, after demand had been made for the payment of alimony, an order to show cause was procured and a hearing had thereon. The petition of the plaintiff is supported by affidavits of the daughter, Mrs. Hamilton, and her husband, H. J. Hamilton.

The defendant filed an affidavit which, among other things, alleged that from 1876 until late in the year 1919 no demand was made upon him for payment of alimony under said judgment by the plaintiff or by any one else in her behalf. That he has no money, property, or means of any kind whatsoever, excepting a pension which he receives from the United States government in the sum of $30 per month; and that he is the owner of a Liberty bond of $50 and three small parcels of real estate in the village of Winneconne worth not to exceed $2,500. It further states that he is of an advanced age (the exact age of defendant not appearing of record) and that he is unable to engage in any gainful occupation and has no means of support.

Upon the hearing of said order to show cause the court ordered and adjudged that the defendant be not punished for contempt; that plaintiff do have and recover as judgment herein, of and from the defendant, the sum of $3,922.30 and the taxable disbursements of this proceeding, stipulated at $22.80; that said judgment be paid by said defendant forthwith, and should any portion of defendant's real estate be occupied as a homestead so that it is not subject to execution, and defendant refuse to sell or incumber it to satisfy the above amount so ordered, he may be cited for contempt for failure to abide by this order. And it was further ordered that the defendant continue to pay alimony to plaintiff herein pursuant to the original judgment, the first payment of said alimony to be made as of date of July 1, 1920,

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and to be made monthly thereafter until the further order of the court; and that the defendant be subject to proceedings for punishment for contempt in case of his refusal so to do.

The record does not satisfactorily disclose the property owned by the defendant or its value. Among other things the plaintiff in her affidavit states that the defendant had, a short time prior to the making of her petition, sold and conveyed a certain piece of land in Winnebago county of the value of $7,600, and that the proceeds of such sale, and other property, constituted the assets of the defendant.

For the appellant the cause was submitted on the brief of *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh.

E. R. Hicks of Oshkosh, for the respondent.

DOERFLER, J. It is contended by defendant's counsel that under the statutes of limitation, sub. (1), sec. 4220, plaintiff's petition should have been dismissed; that she was guilty of laches; and that the court was without authority to direct the conveyance of defendant's homestead to pay arrears of alimony. We will take up and treat these contentions together.

It is held in the case of *Campbell v. Campbell,* 37 Wis. 206, 211:

"The measure of support of the wife and of children committed to the care of the wife depends largely on their need, age and other circumstances, and on the ability of the husband. These are all essentially changeable from time to time; and the support of the wife and children in the wife's care comes within the same policy of continuing authority after divorce, to be exercised from time to time, in view of changes in the premises in which the measure of support rests."

It is also held in *Bacon v. Bacon,* 43 Wis. 197, 204:

"Alimony always rested in discretion, was variable and revocable; subject to the continuing authority of the court

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over it, to be exercised from time to time, in view of changes in the premises on which it had been granted. *Campbell v. Campbell,* 37 Wis. 206. So sec. 28 [of the chapter on divorce as it then existed], still dealing with alimony in its proper, technical sense, authorizes the revision of the judgment granting it, and such new judgment for it, from time to time afterward, as the court might have originally made. *Helden v. Helden,* 7 Wis. 296; *Williams v. Williams,* 29 Wis. 517; *S. C.* 36 Wis. 362; *Campbell v. Campbell, supra; Hopkins v. Hopkins,* 40 Wis. 462; *Thomas v. Thomas,* 41 Wis. 229."

So that it appears from the foregoing that inasmuch as the judgment for alimony is a continuing judgment, always subject to modification by the court during the life of the parties, the statute of limitations cannot and does not apply.

Sec. 2367, Stats., provides:

"In all cases where alimony or other allowance shall be adjudged to the wife or for the maintenance or education of the children the court may provide that the same shall be paid in such sums and at such times as shall be deemed expedient, and may impose the same as a charge upon any specific real estate of the party liable or may require sufficient security to be given for the payment thereof according to the judgment; . . ."

For a period of forty-four years the plaintiff has made every effort to support herself and her child. The fact is undisputed that she has not had an easy life of it and that she has been compelled, in addition to performing hard menial labor, to depend in a degree upon the aid and assistance offered to her by her daughter and son-in-law. During all these years, apparently, no demand was made for the payment of the arrears in alimony and no application was made to the court to enforce such payment. It evidently appears that the defendant relied upon the advice given to him by his attorney, which was to the effect that he did not need to pay any further attention to the payment of alimony, and the plaintiff evidently construed the action of the court

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at that time with respect to her application to mean that she had no further rights in the premises. However that may be, her rights were not lost by reason of her passivity and inaction, and during all this time the obligation rested upon the defendant to comply with the provisions of the judgment.

It can also be said in this case, as was said in *Campbell v. Campbell,* 37 Wis. 206:

"The appellant seems to have thriven since he escaped from the expense of maintaining the respondent and their child. His inexpensive life and his failure to pay even the pittance allowed by the judgment of divorce, no doubt aided him in acquiring and keeping his present estate. . . ."

"Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." 21 Corp. Jur. p. 210, § 211.

"A stale demand or claim in its proper sense is one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties," etc.

"Staleness of claim necessarily implies great lapse of time." 21 Corp. Jur. p. 210, § 211.

While the defendant has not accumulated a large amount of property, it appears from the record that his accumulations are sufficient to reasonably provide for him during the rest of his life. Besides, he is the recipient of a pension from the government of $30 a month, which it is claimed by counsel for the plaintiff has recently been increased to $50 a month.

While the failure on the part of the defendant to comply with the judgment of the court is inexcusable, we can find little excuse for the plaintiff's long delay in asserting her rights under the judgment. Had she insisted upon her rights from time to time, the life of the defendant undoubtedly would have been so regulated as to make proper

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provision for the payment of this judgment. She waited until the defendant became aged and, by reason of old age, infirm, and thus incapable now of earning a livelihood by his own personal efforts.

Under the circumstances we consider it inequitable to enforce the judgment as it now stands, and under the decision in *Campbell v. Campbell,* 37 Wis. 206, and *Bacon v. Bacon,* 43 Wis. 197, would advise a revision and modification of this judgment, in view of the changed and altered circumstances now existing, under and pursuant to which the plaintiff be adjudged a reasonable amount in lieu of past-due alimony, with a provision under sec. 2367, Stats., that the allowance when so made may be imposed as a charge upon the real estate of the defendant.

Sec. 2367 clearly authorizes the court to impose a charge or lien upon the real estate of the defendant, whether it be a homestead or not. *Schultz v. Schultz,* 133 Wis. 125, 113 N. W. 445.

Inasmuch as the value of the defendant's property has not been definitely fixed and determined, it is also suggested that, upon the record being returned to the circuit court, further proceedings be had with the view of definitely fixing the value of such property.

In view of what has been said, the order of the circuit court is reversed, with directions to take such further proceedings in the premises as are indicated in this opinion.

By the Court.—It is so ordered.

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GRIMES, by guardian *ad litem*, Respondent, vs. SNELL, Appellant.

May 31—July 13, 1921.

Automobiles: Law of the road: Rights of pedestrian at street crossing: Automobile colliding with child: Contributory negligence: Question for jury: Instructions: Parent and minor child: Medical expenses and loss of earning capacity.

1. Under sec. 1636—51, Stats., giving operators of automobiles equal rights on all public highways with all other users of such highways, a foot passenger is not entitled to a right of way on a regular street crossing as against an approaching automobile, but each must exercise ordinary care and yield when danger is imminent.
2. An erroneous instruction that a pedestrian had the right of way at a street crossing was not cured by other portions of the same charge to the effect that it was the duty of the pedestrian to use ordinary care and prudence in crossing the street, but that, if the pedestrian observed that the street was clear for a distance greater than could be covered by a vehicle operated at a lawful rate of speed in order to reach the pedestrian's line of travel, she might proceed to cross the street on the assumption that vehicles not within such distance would be operated in a lawful manner.
3. In an action for injuries to a pedestrian, testimony on behalf of the defendant that his automobile was operated at such speed that it must have been in plain view when plaintiff attempted to cross the street, is *held* to raise a question for the jury whether the plaintiff was contributorily negligent in attempting to cross ahead of the car, notwithstanding her testimony that she looked but did not see the automobile; and it was error to instruct the jury that there was no evidence of contributory negligence.
4. Where plaintiff was a minor and there was no evidence that she was emancipated, it was prejudicial error to charge the jury that she was entitled to recover for medical expenses and for all impairment in earning capacity from the time of the injury, plaintiff's parent being liable for her medical expenses and entitled to her earnings until her majority.

APPEAL from a judgment of the circuit court for Crawford county: L. H. BANCROFT, Circuit Judge. *Reversed.*

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Action for damages for personal injuries sustained by a collision with defendant's automobile occurring in the afternoon of May 15, 1919, on Main street in the village of Eastman. Plaintiff, about fourteen years of age, was crossing Main street from east to west with a pail of water. When she had proceeded beyond the line of a car standing on the east side of the street and a short distance to the south, she says she glanced south along the street for cars and saw none. She had an unobstructed view south for three or four blocks. When she had almost crossed the street she saw a car standing on the west side thereof with people around it, and she kept her eyes on that car expecting it to start, and she also looked north, and when within eight or ten feet of the west side of the street she was struck by defendant's car coming from the south and was injured. The jury returned a general verdict in favor of plaintiff and assessed her damages at $5,000. The defendant appealed.

For the appellant there was a brief by *Graves & Earll* of Prairie du Chien and *J. M. Clancey* of Stoughton, and oral argument by *Mr. W. R. Graves* and *Mr. Clancey.*

For the respondent there was a brief by *Alvin B. Peterson* of Prairie du Chien and *Kopp & Brunckhorst* of Platteville, and oral argument by *Mr. A. W. Kopp* and *Mr. Peterson.*

VINJE, J. The court instructed the jury as follows:

"It was the duty of the plaintiff to use ordinary care and prudence in crossing the street. But I instruct you that a foot passenger is entitled to the right of way upon a regular street crossing; and if at the time a pedestrian leaves the curb he or she observes the street is clear and there are no vehicles on the street for a distance greater than that which would be covered by a vehicle operating at a lawful rate of speed in order to reach the pedestrian's line of travel, he or she may proceed to cross the street on the assumption that all vehicles not within such distance will be operated at a lawful rate of speed and in a lawful manner."

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The instruction was erroneous in that it declared that a foot passenger is entitled to a right of way upon a regular street crossing. Sec. 1636—51, Stats. 1919, provides that "Every owner and operator of an automobile or other similar motor vehicle shall have equal rights upon all public highways of this state with all other users of such highways." Lawful users of highways have equal rights thereon except as modified by the laws of the road. *Sutter v. Milwaukee Board of Fire Underwriters,* 164 Wis. 532, 160 N. W. 57, 1034. There is no modification giving foot users a right of way over other users. Each must exercise ordinary care for his own safety and yield when danger is imminent.

It is claimed the remainder of the instruction quoted modifies the statement that foot passengers are entitled to the right of way on a street crossing, but we cannot so read it. To our minds it rather emphasizes the erroneous statement quoted.

The court also erroneously instructed the jury that "there is no evidence in this case to indicate that the plaintiff was at any time guilty of a want of ordinary care." The defendant claimed that the car standing on the east side of the road south of the crossing started up as he approached it and swung out into the street, and that in order to avoid a collision with it he had to turn to the west side of the road, and just as he passed the moving car he struck plaintiff. He testified he did not see her till the moment of impact and she said she did not see his car till it struck her. Under the circumstances it was a question for the jury to say whether or not she exercised ordinary care for her safety. Had she looked south, as she claimed she did, and made the examination the law requires, she could have seen defendant's car coming north, for his speed was so moderate that he must have been in sight at the time she said she glanced south. The jury might well reach the conclusion either that she did not look with sufficient care or that she did not look at all,

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or that she was negligent in not discovering defendant's car in time to avoid a collision after she first glanced south. The question of whether she was guilty of contributory negligence was for the jury to decide. *Moody v. Milwaukee E. R. & L. Co.* 173 Wis. 65, 180 N. W. 266; *Barker v. Savage,* 45 N. Y. 191; 9 A. L. R. 1248, note. The jury might well reach the conclusion that it was no more the duty of defendant to discover her than her duty to see him in time to avoid a collision. *Feyrer v. Durbrow,* 172 Wis. 71, 178 N. W. 306.

There was no evidence in the case that plaintiff was emancipated, and yet the court charged the jury she was entitled to recover for medical fees and services and for all impairment in earning capacity from the time of the injury. This was error. The evidence showed that plaintiff was living with her mother, that she was only fourteen years of age at the time of the injury. The mother was entitled to her earnings till she reached majority and was liable for medical services rendered her. Such instruction was prejudicial error. *Kruck v. Wilbur L. Co.* 148 Wis. 76, 133 N. W. 1117. No one can tell how much of the verdict was made up of these erroneous items of damages.

By the Court.—Judgment reversed, and cause remanded for a new trial.

NINOFF, Respondent, vs. HAZEL GREEN STATE BANK, Appellant.

May 31—July 13, 1921.

Banks and banking: Money paid on forged order: Negligence: Question for jury: Evidence: Expert opinion: Weight: Communications subsequent to event: Harmless error.

1. Where the by-laws of a savings bank provided that the bank should not be liable for payments made by it to any person who should produce the depositor's pass-book and that with-

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drawals might be made by the depositor personally or by written order, payment on a written order to one producing the pass-book exonerates the bank from liability to a depositor, provided the bank in making such payment was in the exercise of ordinary care.

2. While the testimony of expert witnesses is entitled to full, fair consideration by the jury, it is, excepting in a very limited class of cases, not bound thereby.
3. Whether a savings bank in making payment on a forged order, the pass-book being produced, exercised ordinary care, is, under the evidence, a question for the jury, in view of discrepancies in the signature appearing upon the order of withdrawal and that upon the depositor's signature card, and notwithstanding testimony of experienced bankers that in the exercise of ordinary prudence they would have cashed the order.
4. Although immaterial evidence was admitted that the bank, overlooking the fact that payment had been made on the forged order, telegraphed plaintiff that it would pay no one but him, the jury must be presumed to have considered the evidence as of the date the payment was made, and the admission of evidence as to subsequent communications was not prejudicial error.

APPEAL from a judgment of the circuit court for Grant county: L. H. BANCROFT, Circuit Judge. *Affirmed.*

It appears from the complaint that prior to April 27, 1916, the plaintiff had deposited certain moneys with the defendant, such deposit being evidenced by a pass-book designated as "Savings Account No. 864." That the said pass-book was the property of the plaintiff, of the value of $700.55; that prior to April 27, 1916, some person in the city of Toledo, Ohio, wrongfully took from the plaintiff said pass-book and thereafter caused the same to be delivered to the defendant, who refuses to deliver it to the plaintiff, although delivery has been demanded, and the defendant further refuses to pay to the plaintiff the moneys evidenced by said pass-book and unjustly detains the said pass-book, to plaintiff's damage in the sum of $700.

The answer admits the making of the deposits, the issuance of the book, and sets up that by the making of the

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deposit and acceptance of the book the plaintiff assented to the by-laws of the defendant bank, which provided:

"4. Withdrawals of deposits and the interest thereon, may be made by a depositor personally or by written order, if the signature of the depositor be entered on the signature cards of the bank, or by power of attorney duly authenticated. No withdrawal of deposits or interest shall be made unless the depositor's pass-book be produced and the withdrawal entered thereon.

"Payments to Holders of Pass-books.

"The bank shall not be liable for payments made to any person who shall produce the deposit book of the depositor, unless notice shall have, previous to such payments, been given to the bank by or in behalf of the depositor that said book has been lost, mislaid, stolen or otherwise passed from the possession of the true owner thereof."

The answer further alleged that the defendant had received from the Ohio Savings & Trust Company of Toledo, Ohio, the pass-book of the plaintiff, accompanied by an order directing payment of the amount of the deposit to said Trust Company; that upon receipt of the pass-book the defendant compared the signature to the written order with the signature of the plaintiff on the signature card given by the plaintiff to the defendant at the time of the deposit; that no notice of the loss by the defendant of the book had been given to the defendant; that the full amount thereof had been paid by the defendant to the Trust Company, and that by the transactions stated the pass-book had become its property and was not the property of the defendant.

Upon the trial the court submitted to the jury a single question: "Did the defendant bank fail to exercise ordinary care in making payment to the Ohio Savings Bank & Trust Company on April 27, 1916, of the money owing by it on the pass-book in question?" To which the jury answered "Yes."

There were the usual motions. Motion of the plaintiff

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for judgment on the verdict was granted and judgment was entered accordingly, from which the defendant appeals.

S. E. Smalley of Cuba City, for the appellant.

For the respondent there was a brief by *Blaine & Kemp* of Boscobel, and oral argument by *H. E. G. Kemp*.

ROSENBERRY, J. The question presented here lies within very narrow limits. It is undisputed that the defendant bank is not liable if in making the payment in the manner and under the circumstances it was in the exercise of ordinary care. *Wegner v. Second Ward Sav. Bank,* 76 Wis. 242, 44 N. W. 1096. The following is a facsimile of the plaintiff's signature appearing upon the signature card:

A facsimile of the signature upon the order upon which the payment was made is as follows:

There was evidence by three bankers of experience that they would, in the exercise of ordinary business prudence and caution, have cashed the order when accompanied by the pass-book as the defendant bank did in this case. The argument of the defendant is that the evidence in this respect is conclusive and that there is no evidence of want of care on the part of the defendant.

The circumstances under which the book was taken are these: The plaintiff is a Bulgarian and was living in a boarding house in the city of Toledo, where he was working. He kept his pass-book in his inside coat pocket in a cover furnished by the bank. He observed the book and knew that

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the book was in his possession. Each day he looked in his pocket and saw the cover, apparently undisturbed. About a week after he had last actually seen the book he went to the postoffice to cash a postoffice order and then discovered that the book had been removed from the cover and the cover and its contents returned to his pocket. He immediately notified the bank, but before receiving notice the bank had cashed the order already referred to.

It appears to us that there is in this case, as there was in the case of *Wegner v. Second Ward Sav. Bank, supra,* a material difference in the two signatures. Not only was the spelling of the name different, but the whole character of the writing appears to us to be substantially different. The difference is so great it is for the jury to say whether or not the defendant bank should, in the exercise of ordinary care, have required some proof as to the identity of the person making the signature to the order upon which the money was paid. While the testimony of expert witnesses is entitled to full, fair consideration at the hands of the jury, it is, excepting in a very limited class of cases, not bound thereby. *Ladwig v. Jefferson Ice Co.* 141 Wis. 191, 124 N. W. 407; 22 Corp. Jur. p. 728, § 823; *Baber v. Caples,* 71 Oreg. 212, 138 Pac. 472. The payment here was not made to an individual presenting the pass-book personally, but was made upon the signature to the order, and it was the duty of the bank to have carefully scrutinized the signature, and in case of discrepancy or circumstances raising doubt it should have acted with caution.

Error is assigned because of the admission of certain evidence of communications between the parties subsequent to the payment of the forged order. It appears that in response to a telegram from the plaintiff to the defendant, notifying the defendant of the loss of the book, the defendant telegraphed that it would pay no one but the plaintiff, overlooking the fact that payment had already been made

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upon the forged order. In view of the fact that the only issue submitted to the jury was that of the negligence of the bank in making the payment, we do not see how evidence received as to communications had some days later can be prejudicial. The court instructed the jury, to be sure, that they should consider all the testimony in the case. The question submitted by the special verdict related clearly to the exercise of ordinary care in making the payment on April 27th, and we think the jury must be presumed to have considered the evidence relating to that question as of that date, and that the admission of evidence as to subsequent communications, while the evidence is immaterial, did not constitute prejudicial error.

By the Court.—Judgment affirmed.

HUNTLEY, by assignee, Appellant, vs. STANCHFIELD and another, Respondents.

May 31—July 13, 1921.

Injunction: Deeds: Covenants restricting use of property: What constitutes a "hotel:" Who may enforce covenant.

1. The use of a building which had been formerly a lodging house to accommodate transients with lodging and to serve meals, though a large part of the house was occupied by families and persons as boarders and lodgers of a private lodging and boarding house, constituted use as a "hotel," in violation of an injunction against the owners using the property as a hotel, contrary to their covenant when they purchased the property not to do so.
2. Where the R. hotel was operated in connection with the C. hotel, and on sale of the C. hotel the deed contained a covenant that the R. hotel should not be used as such for fifteen years, such covenant was a condition of the conveyance of the C. hotel and was intended for the benefit of such property; and the vendee, after a repurchase of the C. hotel, could enforce it against the owners of the R. hotel, the restriction being for the benefit of the C. hotel property and appurtenant to it.

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3. Such a covenant is not an illegal restraint of trade, as the facts disclose that it was a reasonable one in view of the hotel business in the locality, the situation and objects of the parties, and the circumstances of the transaction.

APPEAL from an order of the circuit court for Grant county: L. H. BANCROFT, Circuit Judge. *Reversed.*

In 1916 *L. N. Patnaude* owned two hotel properties at Platteville, Wisconsin, known respectively as the Columbia Hotel and the Republican House. He operated the Columbia Hotel and used the Republican House as a lodging place for overflow guests of the Columbia Hotel. On October 16, 1916, *Patnaude* entered into a contract with *Murray B. Huntley* and Scott Huntley to convey the Columbia Hotel property to them for the sum of $35,000. The contract contained a provision that the Republican House, owned by *Louis N. Patnaude,* should not be operated as a hotel for fifteen years from the date of the execution of the deed. On January 4, 1917, Scott Huntley and wife conveyed their interest in the Columbia Hotel property to *Murray B. Huntley.* On December 13, 1916, *Patnaude* conveyed the Republican House property to Carl F. Bareis. The conveyance contained a provision that the property should not be used as a hotel for fifteen years from November 14, 1916. On May 23, 1917, Carl F. Bareis and wife conveyed the Republican House property to the defendants, *Nellie E. Stanchfield* and *Nina B. Schultz,* which conveyance contained the provision that the property should not be used as a hotel for fifteen years from November 14, 1916. On August 24, 1917, *Murray B. Huntley* brought action in the circuit court for Grant county to enjoin the defendants from using the Republican House property as a hotel. The circuit court held that, because the proof showed no meals were served to guests, the property was not being used as a hotel and hence there was no violation of the restrictive covenant. Upon appeal this judgment was reversed by the supreme court and judgment was entered enjoining the de-

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fendants from using the Republican House property as a hotel.

On September 10, 1919, *Patnaude* repurchased the Columbia Hotel property from the plaintiff and *Huntley* assigned to him all his rights under the judgment, together with the damages sustained by him by reason of the violation of the injunction by the defendants (*Huntley v. Stanchfield,* 168 Wis. 119, 169 N. W. 276).

This proceeding was brought in the circuit court for Grant county upon an order to show cause why the defendants should not be punished for contempt for violation of the injunctional order in the above-mentioned case. The order to show cause was based upon affidavits of *L. N. Patnaude,* Russell Williams, and *Murray B. Huntley,* alleging that the defendants advertise and compete for transient trade for the Republican House property, now known as the Stanchfield Apartments, that a part of the property is occupied by transient guests, and that a grill room is maintained on the premises in which meals are served to guests. The affidavits also assert that the property is being used as and for a hotel. There were affidavits submitted by the defendants denying the fact that the Stanchfield is used for transient guests and as a hotel.

The case was tried upon the affidavits, and the circuit court dismissed the order on the merits. This is an appeal from such order.

For the appellant there was a brief by *Gardner & Gardner* of Platteville and *Olin, Butler, Thomas, Stebbins & Stroud* of Madison, and oral argument by *H. H. Thomas.*

For the respondent *Stanchfield* there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *Raymond T. Jackson* and *E. C. Fiedler.*

SIEBECKER, C. J. The trial court held that the facts shown by the record and affidavits filed in the proceeding do not show that the defendants violated the injunctional

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order made in the original action, and dismissed the order to show cause why the defendants should not be punished for contempt for violating the injunctional order. The plaintiff claims that it is clearly shown by the affidavits that the defendants are using the Republican House as a "hotel." The fact is undisputed that defendants published in a Platteville newspaper a notice inviting the public to patronize "The Stanchfield" as a good place to stay while visiting the Big Badger Fair to be held for four days, requesting advance reservation, and stating that "The Stanchfield" was modern throughout and had "rooms with private bath." The defendants conducted a grill room in the building. It also appears that travelers occupied rooms for a night, for a day and night, or for several days and nights, and that traveling and touring parties secured accommodation for meals and rooms. The use of printed cards to be signed by guests specifying the engagement of rooms for a period of months at a fixed rate per day, but leaving the customer free to leave at any time, constitutes in fact a system of registration equivalent to that of a hotel register. True, a large part of "The Stanchfield" is occupied by families and persons as boarders and lodgers of a private lodging and boarding house, yet the other use of the house is clearly of the nature and kind for which a hotel is used in the sense as defined in *Huntley v. Stanchfield,* 168 Wis. 119, 169 N. W. 276. Such use constitutes a violation of the injunctional order entered in that case. Admittedly *Patnaude* is the present owner of the Columbia Hotel. Is he, as such owner, entitled to the benefits of the restrictive covenants contained in the deeds before this court in the former case of *Huntley v. Stanchfield?* The covenants in the conveyances of the Columbia Hotel to the Huntleys and of the Republican House property (now the Stanchfield Apartments) to the Stanchfields provide "that the said building known as the Republican

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Hotel shall not be used as a hotel for fifteen years" from November 14, 1916. In the *Huntley Case* it was held that:

"The restriction was effectual against *Patnaude* as owner of the Republican Hotel property and became binding on the subsequent owners by express covenants in the successive deeds, and hence inures to the benefit of the plaintiff as the original party thereto."

It is now asserted by the defendants that this was a personal covenant in favor of the Huntleys, the purchasers of the Columbia Hotel, and in whose deed the covenant was first inserted. This claim is not well founded. It is manifest that the covenant was intended as a condition of the conveyance of the Columbia Hotel property from *Patnaude* to the Huntleys and was intended for the benefit of the Columbia Hotel property. As declared in *Hodge v. Sloan,* 107 N. Y. 244, 17 N. E. 335:

"The contract was good between the original parties, and it should, in equity at least, bind whoever takes title with notice of such covenant. . . . In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it." *Boyden v. Roberts,* 131 Wis. 659, 111 N. W. 701.

In the instant case the defendants not only had notice of it, but expressly accepted the conveyance of the Republican House property subject to the restrictive condition for the benefit of the Columbia Hotel property. We think it clear that the restriction is one for the benefit of the Columbia Hotel property and is appurtenant to it and that *Patnaude* acquired the right thereto as vendee of this property from *Huntley.*

The objection to the covenant that it is void upon the ground that it operates as an illegal restraint of trade is

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not sustained. On this point the inquiry is, Is the restriction a reasonable one under all the facts and circumstances of the transaction in the light of "the situation, business, and objects of the parties," and was the restriction "for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public?" *Cottington v. Swan,* 128 Wis. 321, 107 N. W. 336, and cases there cited.

It is considered that all these considerations are favorably sustained by the facts showing the situation, business, and objects of the parties in view of the nature of the business and the condition of the hotel business in the city of Platteville. It follows that the circuit court erred in dismissing the order to show cause and in holding that the injunctional order entered in the former litigation is not violated.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court for further proceedings according to law.

LOCKMAN, Respondent, vs. STEENSLAND, Appellant.

June 1—July 13, 1921.

Negligence: Notice of personal injury: Waiver of notice: What constitutes: Negotiations looking toward settlement.

1. Although sub. (5), sec. 4222, Stats., provides that no action to recover damages for personal injury shall be maintained unless a written notice or a summons and complaint is served upon the person alleged to have caused such damage, within two years after the happening of the event, the requirement is in the nature of a statute of limitations, which defendant may waive or which he may be estopped to assert.
2. Negotiations between the parties for a settlement of plaintiff's claim for damages, in which no attempt was made to comply with the requirement of sub. (5), sec. 4222, Stats., as to giving notice, do not amount to a waiver by defendant of such requirement, though he had manifested a willingness to settle, and do not estop him from relying upon plaintiff's failure to serve such notice.

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APPEAL from a judgment of the circuit court for Iowa county: L. H. BANCROFT, Circuit Judge. *Reversed.*

This action was brought to recover for personal injuries sustained in an automobile collision which occurred on the 10th day of September, 1917. The summons was served August 29, 1919, and the complaint on October 7, 1919. No notice of the injury and damage, as required by sub. (5), sec. 4222, Stats., was served. A motion to dismiss the action because of such failure was denied. The jury returned a verdict in favor of the plaintiff for $375 damages, and from the judgment entered thereon plaintiff brings this appeal.

For the appellant there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *E. C. Fiedler.*

For the respondent there was a brief by *McGeever & McGeever* of Dodgeville, and oral argument by *James D.* and *W. C. McGeever.*

OWEN, J. The sole question presented is whether the action should have been dismissed because of the failure to serve the notice required by sub. (5), sec. 4222, Stats. This provides that no action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction thereof is claimed of such person or corporation. Such notice shall be served in the manner required for the service of summons in courts of record. Inadvertent inaccuracies in the notice are to be disregarded if it appears that there was no intention on the part of the person giving the notice to mislead the other party and such other party

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was not in fact misled thereby. The notice need not be given if the action is brought and the complaint is served within two years after the happening of the event.

While it is established that this is in the nature of a statute of limitations, it has been held that the service of the notice may be waived by the defendant (*Maurer v. Northwestern Iron Co.* 151 Wis. 172, 138 N. W. 636), and that the defendant may be estopped from claiming the benefits of the statute (*Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234). In the latter case the jury found that the defendant's officers represented to the plaintiff that it was not necessary to serve the notice of injury and claim for damages in order to preserve his rights against the defendant; that the insurance company was bound to pay plaintiff's damages; that the plaintiff had reasonable grounds for believing these statements or representations, and that he was thereby excused from serving the notice; that the failure to serve the notice was caused by his reliance upon these statements and representations. Upon these facts the court there held that the defendant was estopped from insisting upon the failure to give notice as a bar to the action.

In *Maurer v. Northwestern Iron Co., supra,* plaintiff mailed to the defendant a signed notice of the accident and injuries, receipt of which was acknowledged in writing. Thereafter defendant's attorney and agent visited the plaintiff, inquired into the nature of his injuries, and informed him that further notice of the injury was not necessary. Plaintiff relied thereon, believing his claim would be settled without suit, and served no further notice. These facts were held to constitute a waiver of a more strict compliance with the requirements of the statute under consideration.

Plaintiff contends that the negotiations between the parties looking towards a settlement of plaintiff's claim for damages, consisting of letters and personal interviews prior to the commencement of the action, either amounted to a

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substantial compliance with the requirements of the statute as to notice of injury or amounted to a waiver on the part of the defendant, or worked an estoppel on his part, so that he should not now be permitted to urge the failure to give the notice as a defense to the action. The record discloses a number of letters passing between the parties or their attorneys looking towards a settlement of the damages. It appears that the defendant was not only willing but anxious to arrive at a settlement, and that at no time did he deny liability in the premises. There is no letter, writing, or document in the record, however, which suggests an attempt on the part of the plaintiff to comply with the requirements of sub. (5), sec. 4222. The correspondence is rather typical under such circumstances, the general tenor of which is that unless the defendant pay plaintiff $800 an action will be commenced. As we view it, the record discloses no attempt at any time to comply with the provisions of sub. (5), sec. 4222. It is rather apparent that the statutory provision was never thought of by the plaintiff or her attorneys. The defendant at no time waived service of the notice, nor did he say or do anything allowing the plaintiff to believe that service of the notice would not be insisted upon. It is the ordinary situation where, after negotiations for a settlement have failed, action was commenced. If the complaint had been served within two years from the date of the accident and injuries, service of notice would have been unnecessary. But as already seen, the complaint was not served until after the two-year period had elapsed. The failure to give the notice must be held to constitute a bar to the maintenance of the action, and the judgment should be reversed with instructions to dismiss the plaintiff's complaint.

By the Court.—So ordered.

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BRUBAKER, Respondent, vs. IOWA COUNTY, Appellant.

June 1—July 13, 1921.

Automobiles: Imputed negligence of passenger: Husband as agent of wife: Presumption: Joint enterprise: Negligence: Defective highways: Liability of county: State trunk system: Insufficiency due to repairs: Knowledge of county: Barriers and warning signs: New trial to interplead driver of automobile.

1. A husband and wife moving to another city, where the husband intends to teach and the wife to attend college with a view of obtaining a position, are not engaged in a joint enterprise so as to impute to the wife the negligence of the husband while driving in an automobile to the city to which they were moving. *Reiter v. Grober,* 173 Wis. 493, followed.
2. A relation of agency, or such joint financial interest in an undertaking as to make a husband's negligence imputable to his wife, will not be presumed; and the negligence of the husband is not imputable to the wife merely because of the marital relation, when they were not engaged in a joint enterprise and the wife has no direction or control over the husband's movements.
3. The wife was not guilty of contributory negligence in failing to see signs warning of the dangerous condition of the road, or in failing to protest at the rate of speed at which the husband was driving, where the jury found on sufficient evidence that there were no signs which would warn an ordinarily prudent traveler and there was no evidence that the plaintiff, who was in the rear seat, could have formed an intelligent judgment as to the rate of speed.
4. Nor is the wife, while thus riding with her husband over a road apparently in good condition, bound to pay constant attention to the management of the car or to keep a constant lookout for imperfections in the road, though if she sees that he is driving at a dangerous rate of speed or in violation of the law reasonable care requires a protest.
5. Where as part of the permanent construction of a state trunk highway a culvert and grading were ordered by the county authorities and the work was performed under the supervision of the state authorities and left in an unsafe condition, the county had notice of a defect due to the making of such repairs so as to be liable for an injury under sub. 5, sec. 1317, Stats.

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6. The posting of signs on a road which was being repaired stating that it was closed for travel was not sufficient to relieve the county from liability, where there were no barriers and the signs were not such as would have warned an ordinarily prudent traveler, and to the knowledge of the county authorities the road was being used by the public.
7. A new trial will not be granted, after judgment for plaintiff, to enable the county to interplead the husband as a defendant and have contribution from him.

APPEAL from a judgment of the circuit court for Iowa county: L. H. BANCROFT, Circuit Judge. *Affirmed.*

Action for damages for personal injuries caused by the insufficiency of a state trunk highway. Trial before a jury resulted in judgment for the plaintiff upon a special verdict after a finding of contributory negligence had been changed by the trial court. Defendant appeals.

On August 25, 1919, plaintiff, her husband, and her sister were proceeding from Oshkosh, Wisconsin, to Sioux City, Iowa, where plaintiff and her husband intended to reside. They were traveling in the husband's automobile. He was driving and plaintiff and her sister sat in the rear seat. The car was relatively heavy and had good brakes and good lights. They were traveling, at least in the main, on the state trunk highway between Madison and Dodgeville. As they approached the latter city it was between twilight and dark and the lights on the car were lighted. The driver testified that he was keeping good watch of the road ahead and was going not over twenty miles per hour. Plaintiff was paying no attention to the driving, but both she and her sister testified that they were going slowly. There was no other direct testimony on the question of speed. It was undisputed that the road at this point was commonly traveled and was in good shape for travel up to the place of the accident.

While thus proceeding the driver suddenly noticed a sharp incline over a culvert which crossed the road. He stated that he noticed this condition only when very close,

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about two or three car lengths, probably forty or fifty feet, from the place. Plaintiff testified she first noticed it when it was right in front of the car. The driver attempted to stop the car but was unable to do so until he had passed over the culvert and some forty-five feet beyond, all distances, presumably, being measured from the front of the car. In passing over the incline plaintiff was thrown out of the car upon the ground and received the injuries complained of.

The highway was being relocated in places and repairs and construction were being made on parts of the old road. The diagram used at the trial does not appear in the record and it is difficult for this court to exactly locate all the roads and points mentioned in the testimony and to determine which are new and which are old.

There was much testimony to the effect that the road was closed to travel and that signs were posted to that effect. The testimony regarding these signs was confusing. It appeared they were sometimes in place and sometimes out of place, that at least one was in place the night of the accident, and that there were none near the culvert itself. Some things appeared clearly: there was no sign or barrier across or upon the traveled track, no lights were placed, none of the signs were of very large size or great prominence, and it was well known to the authorities, and expected, that persons would continue to use the road despite the signs. None of the occupants of the car saw any signs. The road beyond the signs and up to the culvert was in good repair and without evidences of incomplete construction.

There was a traveled turnout at the culvert by which cars could pass around instead of over it, and it seemed that this was customarily used by persons acquainted with the situation. The occupants of the car did not notice it, however. The culvert was covered with a layer of dirt, and it formed an elevation of eighteen or twenty inches in a slope of six feet, the slope being steeper on the side from which the car approached than it was on the side beyond.

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Several travelers on the highway came along shortly after the accident. One of these testified that there was just enough dirt over the culvert so that a person who didn't know the situation would drive on it; that there was a track over it, presumably the track of plaintiff's car, but no indicated travel over the top. Another of these testified that a stranger who didn't know the road would drive over the culvert and not look to the side of the road, for there had been several cars passing over it.

There was no testimony as to the space required to stop plaintiff's car from a speed of twenty miles per hour or less.

The jury found that the highway at this place was not in a reasonably safe condition for public travel by persons in the exercise of due care and that this condition was the proximate cause of the accident. They found that there were no signs or barriers such as would attract the attention of an ordinarily prudent traveler to notify him that the highway was not open to travel; that there was want of care on the part of the driver which proximately contributed to the injury; and fixed damages at $1,200.

The trial court changed the finding of negligence on the part of the driver and ordered judgment for the plaintiff.

For the appellant there was a brief by *R. T. Jackson,* district attorney of Iowa county, and *Fiedler, Fiedler & Jackson* of Mineral Point, of counsel; and the cause was argued orally by *R. T. Jackson.*

For the respondent there was a brief by *McGeever & McGeever* of Dodgeville, and oral argument by *James D.* and *W. C. McGeever.*

JONES, J. It is earnestly argued by appellant's counsel that the court erred in changing the answer of the jury in which they found that the driver of the car was guilty of contributory negligence. There is undoubtedly some force in the claim that he should have sooner seen the elevation in the road and that he should have sooner stopped the car.

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But in view of the rule which now obtains in this state it becomes unnecessary to decide whether the ruling of the court complained of was erroneous. Under the rule which long prevailed in Wisconsin as declared in *Prideaux v. Mineral Point,* 43 Wis. 513, one voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it. As pointed out by Mr. Justice VINJE in a recent case, this rule of imputed negligence has never received extended judicial approval and has been adhered to in only a few states. Since it was not a rule of property this court felt at liberty to change it in the interests of justice and to conform to the overwhelming majority rule. The opinion closed with this language:

"Only so much of the *Prideaux Case* is overruled as imputes the negligence of the driver to an occupant in a private conveyance who has no control over the driver; is not engaged in a joint undertaking with him; is guilty of no negligence himself; and stands in no other relation to him requiring his negligence to be imputed to the occupant." *Reiter v. Grober,* 173 Wis. 493, 181 N. W. 739.

Thus we are squarely confronted with the question whether the facts of this case are such that negligence of the driver would have defeated a recovery by the plaintiff. Appellant's counsel argue that plaintiff and her husband were engaged in a joint undertaking. The argument is based on the facts that they were moving their home from Oshkosh to Sioux City. The husband intended to teach and the plaintiff to attend college to improve her stenography and obtain a position. There is no evidence that the journey was undertaken merely at the request of the wife or of any fact showing that the husband was acting as her agent, or that they were jointly operating or controlling the movements of the car at the time of the accident. Nor is there

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any proof that they were engaged in any joint financial undertaking. As fellow travelers they were going from Oshkosh to Sioux City to pursue their several avocations. In one sense husbands and wives in their journey through life are always engaged in joint enterprises, sometimes successful, sometimes disastrous. But the mere fact that they travel in the same car, whether for pleasure or to change their abode, does not constitute a joint enterprise within the meaning of the rule under discussion.

Doubtless there may be such special facts showing agency or such joint financial interest in the undertaking as to make the negligence of the husband imputable to the wife and to defeat a recovery on her part. But no such facts are found in this case and there is certainly no presumption that any such relation existed. It was merely the ordinary social and domestic relationship involved when husband and wife are traveling together. There are numerous cases which hold that, when a wife is traveling with her husband when they are not engaged in any joint enterprise and when she has no direction or control over his movements, she is not chargeable with his negligent acts. In other words, from the mere marital relationship the contributory negligence of the husband is not to be imputed to the wife. *Louisville, N. A. & C. R. Co. v. Creek,* 130 Ind. 139, 29 N. E. 481; *Louisville R. Co. v. McCarthy,* 129 Ky. 814, 112 S. W. 925; *Finley v. C., M. & St. P. R. Co.* 71 Minn. 471, 74 N. W. 174; *Bailey v. Centerville,* 115 Iowa, 271, 88 N. W. 379; *Reading Tp. v. Telfer,* 57 Kan. 798, 48 Pac. 134; *Dudley v. Peoria R. Co.* 153 Ill. App. 619; *Kokesh v. Price,* 136 Minn. 304, 161 N. W. 715.

It is argued by appellant's counsel that the court erred in refusing to submit to the jury the question of the contributory negligence of the plaintiff herself. Doubtless the plaintiff was bound to use such care as a reasonably prudent person would exercise under similar circumstances. It cannot be successfully claimed that plaintiff should have seen

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signals warning of danger, since the jury found on sufficient evidence that there were none which would warn an ordinarily prudent traveler. It is claimed that the rate of speed was excessive and that plaintiff should have known it and remonstrated. There was no direct evidence that they were going faster than twenty miles per hour, but it is argued that the physical facts show a much greater speed. In this argument there is the weakness that no testimony was offered to show within what distance such a car going at the rate of twenty miles per hour could have been stopped. Even if plaintiff had been intent upon the subject, it is doubtful whether under the conditions she could have formed any intelligent estimate of the rate of speed. There is no evidence that she had any reason to doubt the care or skill of the driver of the car.

It is true that she was not paying attention at the time to the operation of the car. But we do not understand that a wife sitting in the rear seat when her husband is driving a car over a road apparently in good condition is bound to pay constant attention to the management of the car or to keep a constant lookout for imperfections in the road. Much advice and many suggestions to the driver by one sitting in the rear seat are not conducive to the best management of the car. If the occupant sees the driver is driving at a dangerous rate of speed or in violation of the law, reasonable care would require that the passenger protest. This was illustrated in the recent case of *Howe v. Corey*, 172 Wis. 537, 179 N. W. 791, cited by appellant, where the plaintiff, a guest, testified that they were going at least fifty miles per hour in a city; he was sitting on the front seat keeping no watch and merely remarked that they were going pretty fast. They ran into a railroad train standing on a crossing, and it was held that plaintiff could not recover. Other cases might be cited where the passenger knew or ought to have known of the danger and, failing to remonstrate, was denied

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recovery; but they do not seem to us controlling under the facts of the present case. The trial judge, after hearing the testimony and seeing the witnesses, held that there was no credible evidence to be submitted to the jury on this question, and we agree.

Appellant's counsel urge that the highway at the point where the accident occurred was not part of the trunk system of highways for the maintenance and repair of which the county was responsible. The complaint alleged that the highway in question was part of the trunk highway system. The answer set up that the highway had never been adopted by the county nor had become a part of the county highway system, but expressly alleged that the place where the accident occurred was and is on the state trunk highway, and set up that at the time of the accident it was closed owing to repairs being made thereon. That the scene of the accident was a point on a part of the trunk highway system going through the county seems established by the admission in the answer as well as by the testimony of one of the county officers. The testimony was undisputed that the culvert and grading at this point were ordered by the county authorities as part of the permanent construction of the trunk highway, and that the work was performed under the supervision of the state authorities. Since the work of grading the culvert was done by the defendant and since it was left in unsafe condition as found by the jury, we are convinced that defendant had notice of the defect and that there was insufficiency and want of repair within the meaning of sub. 5, sec. 1317, Stats., for which defendant was liable.

We do not think that there is merit in the claim that the road was closed for travel. As appears from the statement of facts there were no barriers and the road at this point was being used by the public, as defendant's officers knew. The finding of the jury as to want of proper signals was sustained by the evidence. If defendant intended to close

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the road for travel more effective means should have been taken.

Appellant claims error in giving the following instruction:

"In that connection I further instruct you that a stranger driving upon a public highway has a right to presume that such highway is in reasonably safe condition for the ordinary travel passing along and over the same."

Since we have held that the negligence of the husband, if any, was not imputable to plaintiff, and that the court properly refused to submit the question of plaintiff's negligence to the jury, it seems unnecessary to discuss the merits of this contention. Of course the existence or non-existence of this presumption would have a bearing on the question of how great a speed might be attained without raising a duty on the part of the passenger to remonstrate. But the evidence does not show that the plaintiff knew or had reason to know of such a speed even if it be assumed that the instruction was incorrect.

It is suggested by appellant's counsel that if the court should be of the opinion that the negligence of the driver cannot be imputed to the plaintiff a new trial should be granted in order that the defendant might have the privilege of interpleading the plaintiff's husband as a defendant in this case in order that appellant might have contribution. If so advised the county may of course bring its independent action against the driver of the car on the ground that his alleged negligence jointly contributed to the plaintiff's injuries. But in our judgment the interests of justice would not be served by requiring the plaintiff to await the delay which would be caused by the proceeding suggested by appellant.

By the Court.—Judgment affirmed.

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AMBROZ and another, Appellants, vs. LA CROSSE MUTUAL LOAN & BUILDING ASSOCIATION and another, Respondents.

June 1—July 13, 1921.

Building and loan associations: By-laws: Withdrawals: Loss of profits.

Where the by-laws of a building and loan association provided that in case of the withdrawal of a member he would be entitled to only fifty per cent. of the profits made during membership, a member who surrendered his original loan, took out a new one, and at such time accepted a check for the balance due him after being credited with one half of the profits, cannot thereafter recover from the association the entire profits on the old loan.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover profits claimed to be due plaintiffs while members of defendant association. Plaintiffs July 1, 1915, obtained a loan of $13,000 from the defendant, secured by a mortgage on real estate, and made monthly payments thereon. Under the usual experience of the association the loan would be fully paid in about nine years if monthly payments and premiums bid therefor were paid. The monthly payment on their mortgage was $65 and the premium bid by them was $31.20. In December, 1918, plaintiffs were in arrears and made application for a new loan of $11,000. The by-laws, a copy of which plaintiffs had, provided that in case of withdrawal members were entitled to only fifty per cent. of the profits made by the association during membership. Plaintiffs claimed that *Mr. Luening,* the secretary of the association, told them that they would be entitled to all their profits upon the new mortgage. This *Mr. Luening* denies, and this is the vital fact in dispute.

The circuit court submitted the cause to the jury in a special verdict containing these questions:

"(1) Did the defendant *William Luening,* at or before the making and execution of the plaintiffs' second mortgage

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in February, 1919, agree with the plaintiffs that if they surrendered their stock and took a new loan that the defendant association would credit them with all they had paid into the association, including premiums, besides their proper share of the profits under the by-laws, receiving the same proportionate return on their investments as if they should remain in said association until the maturity of their stock? *A.* Yes.

"(2) If you answer question No. 1 'Yes,' then did plaintiffs make, execute, and deliver the second mortgage and surrender their stock in reliance upon said agreement? *A.* Yes."

Thereafter the court denied plaintiffs' motion for judgment on the verdict, and entered an order granting defendants' motion for judgment notwithstanding the verdict. Judgment dismissing the plaintiffs' complaint and for costs was accordingly entered for the defendants. The plaintiffs appealed.

For the appellants there was a brief by *Lees & Bunge* of La Crosse, and oral argument by *George W. Bunge.*

For the respondents there was a brief by *George H. Gordon, Law & Gordon* of La Crosse, and oral argument by *George H. Gordon.*

VINJE, J. It is evident that the trial court set aside the verdict because unsupported by the evidence. The record sustains the action of the court. Both plaintiffs admitted that *Luening* told them they could get only fifty per cent. of the profits. The by-laws so provided. The settlement made at the time was as follows:

Loans in 61st series		$13,000 00
Credit:		
42 payments at $65 (dues)	$2,730 00	
50 % of accumulated profits to Jan. 1st	477 10	
		$3,207 10
Less—		
4 mo. dues, arrears	$260 00	
4 mo. interest, arrears	260 00	

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4 mo. premium	124 80	
4 mo. fines	11 67	
	$656 47	
Taxes	296 52	952 99
		$2,254 11
Paid by order No. 3873		254 11
		$2,000 00

Old loan	$13,000 00
New loan	11,000 00
Credit as per above	2,000 00

This showed that they received only fifty per cent. of profits, and *Mrs. Ambroz* received a check for the balance due them of $254.11 and kept the proceeds and has never offered to return them.

They voluntarily signed papers for a new loan after *Mrs. Ambroz* had been given a check for $254.11 representing the difference between the value of their stock and the amount of the new loan. There is no claim that they signed the new mortgage by mistake or duress. They paid interest on the new mortgage two or three months, then took up the mortgage by making a new loan elsewhere, and later brought this action to recover the balance of the profits claimed to be due them. The case presents only a question of fact which the trial court correctly resolved. The case should not have been submitted to a jury at all.

By the Court.—Judgment affirmed.

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MAHONNA, Appellant, vs. MAHONNA, Respondent.

June 1—July 13, 1921.

Divorce: Cruel and inhuman treatment: Successive divorce actions by wife.

In a divorce action brought by the husband, evidence that the defendant wife had previously brought several divorce actions against him charging failure to support and desertion, and also illicit relations with another woman, which suits were dismissed, is *held* insufficient to establish a substantial foundation for the husband's claim that there was cruel and inhuman treatment of him by the wife.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The parties to this divorce action were married in Syria in 1891. At the time of the trial the plaintiff was fifty-three and the defendant fifty-seven years of age; they have one child, a daughter now married. They came to this country about 1893. Plaintiff was a peddler at first and subsequently ran a retail store.

The defendant wife brought several divorce actions against the husband, plaintiff here, commencing in 1911. The first was dismissed, and in the second a judgment was entered in her favor in May, 1915, on the ground of the husband's failure to support and wilful desertion, and providing that he should pay $1,000 in monthly payments. These payments were subsequently made. The complaint in that action had charged the husband with illicit relations with a woman employed by him in helping him to run the store. This, however, was found by the court to be unproven and untrue. A third action for divorce was brought by the wife for failure to support and desertion, reciting the previous divorce actions and alleging adultery on the part of her husband with the same woman. When this case was brought to trial it was dismissed.

This action was brought by the husband, his complaint

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reciting the former divorce suits by the wife, that they were without merit, that orders to show cause had been obtained in those divorce actions and orders made requiring him to pay alimony and attorney fees, and that he had been repeatedly called upon by the attorneys for his wife for money in connection with such actions, and that all of these things had affected his business and credit and preyed upon his mind, discouraged him in business, etc., and thereby constituted cruel and inhuman treatment.

His testimony, which is alone relied upon, is to the effect that after the first divorce suit brought by his wife she told him she would soak blood out of him; that of the several attorneys for his wife in her divorce actions, one called upon him twice, another once, and a third wrote one letter with reference to unpaid alimony. He testified that all these things affected his health and his business. He went through bankruptcy once, but no connection is shown between that and anything done by his wife. The daughter, on behalf of the mother, testified quite fully as to the family life.

The findings of the court were that the defendant was not guilty of cruel and inhuman treatment of the plaintiff and dismissed the complaint upon the merits. From such judgment the plaintiff has appealed.

For the appellant there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

For the respondent the cause was submitted on the brief of *W. H. Frawley* of Eau Claire.

ESCHWEILER, J. The record in this case and as summarized in the above statement of facts discloses no proof of any substantial foundation for plaintiff's claim that there was cruel and inhuman treatment of him by his wife.

The trial court was fully justified in making the disposition of this case that he did and it is not deemed necessary here to say more.

By the Court.—Judgment affirmed.

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STATE EX REL. MORGAN, Attorney General, Plaintiff, vs. CITY OF PORTAGE and others, Defendants.

June 2—July 13, 1921.

Public utilities: Improvements of municipal waterworks: Payment: Constitutional limitation of municipal debt: Application: Purchase of utility.

1. While sec. 927—16, Stats., authorizes cities to acquire and construct public utilities and to issue bonds payable only from the revenue thereof and secured by statutory mortgage liens thereon, bonds so issued and secured do not create a corporate indebtedness within the constitutional limitation (sec. 3, art. XI); and a city cannot be coerced into complying with an order of the railroad commission to make improvements in its waterworks system pursuant to like provisions of such act relative to extensions, additions, and improvements, if it would thereby exceed its constitutional indebtedness, the effect of such compliance being to mortgage the city's waterworks to secure the payment of a corporate debt incurred after the works were acquired by the city.
2. Although sec. 927—19*b*, Stats., authorized a city to execute a mortgage upon an entire public utility or a part thereof, and that "no municipal liability shall be created thereby," the city may not mortgage its property to secure the payment of a liability not in the nature of a purchase-money lien, if to do so would result in creating a corporate indebtedness in excess of the constitutional limitation—though such limitation has no application where the expenditure is incurred to perform a municipal function due to an overwhelming public necessity,—as the expenditure directed by the railroad commission in this case does not pertain to a governmental function but to a business voluntarily conducted by the city in its proprietary capacity.

ESCHWEILER, J., dissents in part.

ACTION of *mandamus* commenced in this court by leave granted. The issues are presented to the court upon the petition, the alternative writ, and a motion to quash the alternative writ.

The action was brought to compel the city of *Portage* to comply with an order of the railroad commission directing

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the making of improvements in its waterworks system. The railroad commission issued to the city a certificate permitting it to issue mortgage certificates to pay for the improvements under the provisions of sec. 927—19*b*, Stats. It is conceded that the city was at the time of the making of the order, and has been at all times since, indebted to substantially its full constitutional limitation. Petitioner alleges that the city can comply with the order by availing itself of either sec. 927—16 or 927—19*b* as a means of raising money. The city refused to issue any certificates either under sec. 927—19*b* or 927—16, claiming that do so would be in violation of the constitutional prohibition of sec. 3, art. XI, of the state constitution.

For the plaintiff there was a brief by the *Attorney General* and *Ralph M. Hoyt,* deputy attorney general, and oral argument by *Mr. Hoyt.*

Harlan B. Rogers of Portage, for the defendants.

There was also a memorandum brief signed by *John C. Thomson* of New York City, *T. L. McIntosh,* corporation counsel of the city of Superior, and *R. M. Rieser,* assistant corporation counsel, as *amici curiæ,* and oral argument by *J. E. McMillan* of Milwaukee and *Mr. Rieser.*

SIEBECKER, C. J. It is undisputed that if the mortgage certificate the railroad commission authorized the city of *Portage* to issue for the purpose of securing funds for the improvement of its waterworks as directed by the commission is added to the city's existing indebtedness, then the city's indebtedness will exceed the five per cent. limitation prescribed by sec. 3, art. XI, of the constitution.

It is the contention of the state that the city can comply with the order of the railroad commission in making the directed improvement of its waterworks by availing itself of the provisions of sec. 927—16 or 927—19*b*, Stats., as a means of raising the necessary funds. This claim of the

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state is based on the ground that any funds raised by the city to make the contemplated waterworks improvements do not constitute an indebtedness of the city within the sense of the constitutional limitation under the provisions of these statutes. The question is therefore presented: Do the schemes prescribed by these statutes provide a means by which municipalities may "purchase, acquire or construct any public utilities, . . . to provide for the payment thereof, and to provide for any extensions, additions and improvements that are necessary" without thereby incurring a municipal indebtedness in the sense of the constitutional limitations forbidding municipalities to become indebted in any manner or for any purpose to any amount exceeding five per cent. of the assessed valuation of the taxable property therein? An examination of sec. 927—16 discloses a legislative attempt to accomplish these purposes.

Sub. 1 declares that whenever the voters have determined by vote to purchase, acquire, or construct a public utility the governing authority "shall have power . . . to provide for the payment thereof, and to provide for any extensions, additions and improvements that are necessary," in the manner provided; namely, by setting aside the income and revenue of such utility as a separate and special fund, which is to be applied to pay the expense of its maintenance and operation and the payment of the purchase or construction price. This revenue is divided into fixed proportions for (a) maintenance and operation, (b) an adequate depreciation account, and (c) the payment of the principal and interest of the bonds authorized by this statute. Sub. 3, 4, 5, 6, and 7 specify in detail how these three proportions of the revenue shall be made up and expended. Sub. 8 provides for the issuance of bonds to secure means for the payment of the utility and "for any extensions, additions and improvements thereof, . . . which bonds shall be payable only out of the said special redemption fund." The obligations of such

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bonds for payment of the principal and interest "shall be a valid claim of the holders thereof only against the said special redemption fund and the fixed proportion or amount of the revenues pledged to such fund, and shall not constitute an indebtedness of such city, village or town within the meaning of the constitutional provisions and limitations." Sub. 9 relates to the cost and value of services rendered by the utility to the municipality and the payment thereof as a current expense, and the costs of such services for the municipality must, under sub. 10, be just and reasonable. By sub. 11 all the moneys realized on a sale of bonds "shall be applied solely for purchasing, acquiring or constructing such public utility, and in the payment of the cost of any necessary extensions, additions and improvements," and "there shall be and there is hereby granted and created a statutory mortgage lien upon the public utility so purchased, constructed or acquired to and in favor of the holders of the said bonds . . . and the coupons of said bonds." It is provided that in case of default in payment of the bonds this lien may be enforced by action, and in case of the sale of the utility to satisfy such lien the purchaser shall be vested with an indeterminate permit to operate the utility. The result of these provisions is to provide for the payment of the purchase price of a utility when acquired or constructed, including necessary improvements, additions, and extensions, out of the earnings of the utility. In substance the statute provides for the creation of a purchase-money lien on the utility and the application of the revenue it produces for the payment of the expense of its operation, depreciation, and the cost of acquisition or construction. The effect of the scheme is to subject the utility to a purchase-money mortgage lien, which the city does not assume to pay by resorting to its taxing power or to its property or funds. The city assumes no financial obligation, but contracts to perform the duty of managing the revenues of the utility for the bene-

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fit of the purchase-money lienors, and if the utility pays for itself in the manner provided by the statute then the municipality is to become the owner of the utility. In speaking of the significance of the word "debt" as used in sec. 3, art. XI, of the constitution, this court said in *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018:

"It means 'something owed;' 'money due or to become due upon express or implied agreement.' . . . It denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. (Citing.) Under the constitution as well as under the law of taxation the question is: Is the city indebted?"

The court held in that case that contracts for the purchase of park land under statutes authorizing such purchases, upon terms "creating a lien thereon for such purchase money, without creating any corporate liability therefor, do not constitute a city indebtedness within the constitutional limitation restricting city indebtedness." In *Connor v. Marshfield,* 128 Wis. 280, 107 N. W. 639, the court reexamined the holdings in *Perrigo v. Milwaukee,* 92 Wis. 236, 65 N. W. 1025; *Milwaukee v. Milwaukee Co.* 95 Wis. 424, 69 N. W. 819, and the *Burnham Case,* and reconsidered the question "whether, when a city purchased property or acquired the right to purchase it, from the fact that rights in or burdens upon that property were held by others, so that the city, to hold it and protect the interest acquired in it, must pay large sums of money, the city thereby became indebted for such sums in the constitutional sense," and there stated that this court in the *Burnham Case* ". . . reviewed the conflicting array of decisions, and, rejecting the reasoning of those the respondents now cite, we decided the question in the negative. The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditor of its grantor into applying to his claim either its general revenue or property owned by it at

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the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own." We can perceive no ground upon which to distinguish the scheme and plan embodied in sec. 927—16, Stats., for the acquisition of utilities by cities from the principle involved in these adjudications respecting the creation of corporate indebtedness. The plan embodied in this statute is declared by the legislature not to create a municipal debt, and the municipalities are not committed to any expenditure of their funds or property except to pay for current services rendered by the utility to the municipality at reasonable prices out of current revenue. To the latter there can be no legal objection. We are persuaded that the effect of the provisions of sec. 927—16, Stats., in so far as it authorizes the acquisition and construction of public utilities by cities, towns, and villages and grants them power to provide for the issuance of bonds to be paid out of the income and revenue of such utility in the manner prescribed therein, is not to create a corporate indebtedness of any such city, town, or village within the meaning of the provisions of sec. 3, art. XI, of the constitution.

The point is urged that this scheme and plan of paying the cost of purchase or construction of any such utility in the manner prescribed out of the income and revenues cannot be legally applied to the cost incurred for improvements, extensions, or additions to a utility after the utility has been purchased or constructed, for the reason that the provision made for the issuance of bonds to cover the cost of such improvements, additions, and extensions necessarily pledges the property of the utility after it has been paid for in the manner prescribed and has become the property of the city under the provisions of this statute. We think there is merit in this claim. It is manifest that after the utility property has been mortgaged to secure the purchase-money lien created in the manner provided by this statute, it cannot

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again be subjected to a new mortgage lien for subsequent improvements, additions, and extensions, if such an indebtedness is in excess of the constitutional limitation, because such a mortgage of the utility property necessarily presupposes the creation of a corporate liability of the municipality for whose payment such security is given other than a purchase-money lien, and would amount to mortgaging property of the municipality to secure the payment of a corporate liability in the form of a debt which did not rest on such property as a lien in the nature of a purchase-money mortgage. It is to be observed that the improvements, additions, and extensions now referred to include such as are attempted to be made after the utility has been acquired by the municipality. It does not follow from this, however, that a city, town, or village may not, at the time of acquiring an existing utility, undertake to improve it, or make additions or extensions thereto for the purpose of providing an efficient utility by putting it in proper condition to render adequate service to the public, and treat the cost thereof as a part of the consideration of acquiring and constructing the utility and provide for the payment of such cost out of the revenue derived from its operation in the manner prescribed by sec. 927—16. It is considered that the part of sub. 11 of this statute which attempts to confer authority on cities, towns, and villages to provide for the payment of the cost of extensions, additions, or improvements of a utility after it has been acquired by additional bond issues in the manner provided in the act would be in violation of the constitutional limitation regulating municipal indebtedness if the cost of such improvements, in addition to the corporate indebtedness, should be in excess of the constitutional limitation.

Upon these considerations it follows that the city of *Portage* cannot be coerced into complying with the order of the railroad commission under the provisions of sec. 927—

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16, for the reason that a compliance with the commission's order would result in mortgaging the city's existing waterworks to secure the payment of a corporate debt incurred after the works were acquired by the city. It is admitted that if the city adds the costs of the ordered improvements to the waterworks to its present indebtedness it will exceed the constitutional limitation of its indebtedness. As above indicated, if the city should attempt to make the improvement and pay for the same in the manner provided by sec. 927—16 it would necessarily result in creating a corporate debt and thus violate the prescribed limitations of its indebtedness.

It is urged by the state that if the city cannot proceed to make the improvement of its waterworks as ordered by the railroad commission, then the provisions of sec. 927—19*b* furnish an exact means to enable the city to raise the money to pay the costs of the improvements without incurring a debt within the meaning of the constitutional provision limiting municipal indebtedness. The statute need not be repeated here. It suffices to call attention to its provisions and to say that if the method prescribed by the legislature authorizing the city to execute a mortgage or trust deed upon the entire plant or a part thereof; that such "mortgage certificates" shall be secured by such mortgage or trust deed; and that "no municipal liability shall be created thereby," it constitutes a scheme which is subject to the same infirmity as the one providing, under sec. 927—16, for additions and extensions to existing utilities. To carry out this scheme results in mortgaging the city's property to secure the payment of a liability which was not a lien on the city's property in the nature of a purchase-money mortgage, and constitutes in fact an application of the property to the payment of a corporate debt. It must therefore be held that the city of *Portage* cannot make the improvements ordered by the railroad commission under the provisions of secs.

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927—16 and 927—19*b*, because it would result in creating a corporate indebtedness in excess of the constitutional limitation.

But it is urged that the city of *Portage* can be coerced to comply with the commission's order under the scheme of sec. 927—19*b* upon the ground that the constitutional limitation of municipal indebtedness has no application to an indebtedness of a municipality in cases where the expenditure is incurred to perform a municipal function due to an overwhelming public necessity. It must be borne in mind that the expenditure ordered and here in question does not pertain to a governmental function, but to a business the city is conducting in its proprietary capacity in which the city engages voluntarily. True, in the conduct of such business it can do nothing to the detriment of the public health, good order, and the general welfare. If it transgresses its legal duties in these respects it can be coerced to obey the law. It does not follow, however, that a city, in order to remedy an evil like the one the commission found exists in the city of *Portage,* can create an indebtedness in excess of the constitutional limitation. If a city can do this it would afford an easy way to create large corporate indebtedness in cases like the instant one through extensions and enlargements of a public utility of a city. We think that the municipal debt created by assuming to pay the expense of improving a city's water plant in order to furnish its inhabitants with a reasonably adequate supply of wholesome water, as the city of *Portage* was directed to do by the railroad commission by the issuance of mortgage certificates as prescribed by sec. 927—19*b,* would create a debt within the constitutional provisions and cannot lawfully be incurred if it exceeds the prescribed five per cent. limit.

Upon the foregoing considerations it follows that the city of *Portage* cannot be coerced by *mandamus* to carry out the order of the railroad commission.

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By the Court.—The petition of the relator must be dismissed, and the alternative writ of *mandamus* is quashed.

The following opinion was filed October 3, 1921:

ESCHWEILER, J. (*dissenting in part*). With so much of the decision as dismisses the relator's petition and quashes the alternative writ of *mandamus* I concur. That portion of the decision disposes of all that is squarely presented in this case. So much of the decision as suggests methods that may be pursued under either of the statutory proceedings discussed in the decision is upon questions not before us and is not necessary for the determination of this case. For that reason I shall content myself with saying that in my judgment such suggestions are an advance judicial approval of methods of avoiding the clear intent and express language of a constitutional provision, the recent amendment to which indicates the disapproval of the people of this state to there being piled up, either directly or indirectly, additional municipal burdens or obligations when the established limitation has been reached.

STATE EX REL. DULANEY, Respondent, vs. NYGAARD, County Clerk, Appellant.

June 2—July 28, 1921.

Taxation: Incomes: Stock dividends: Constitutional law: Construction of constitution or amendment.

1. The rule known as the American rule, that, where there is an ownership of stock for a term and a remainder over, income accumulated during the term and distributed as dividends, regardless of how distributed, goes to the owner for the term, while followed in Wisconsin (*Soehnlein v. Soehnlein,* 146 Wis. 330), is not deemed controlling on the question as to whether, under the amendment of the constitution adopted in 1908, stock dividends are included within the word "incomes" and therefore taxable.

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2. Under sec. 1, art. VIII, Const., as amended in 1908, providing that the rule of taxation shall be uniform and that taxes may be imposed on incomes, the act of 1917 (sec. 1087*m*—2, Stats.), declaring that the term "income" shall include all dividends derived from stocks, the term "dividends" including any distribution, whether in cash or in the stock of a corporation, is valid; and a stock dividend paid to the stockholder by a foreign corporation doing no business in Wisconsin is taxable as income although not disposed of by the stockholder.
3. The word "income," as used in the amendment, has been given in former cases a liberal rather than a technical meaning; and when a clause in a constitution or an amendment thereof confers new broad powers upon the legislature, it is not within the province of the courts to limit the grant by technical requirements.
4. The question whether a law should be held void because of its repugnance to the constitution is one of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *V. M. Stolts,* district attorney of Eau Claire county, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Bundy & Beach* of Eau Claire, and oral argument by *P. M. Beach.*

JONES, J. This is a *certiorari* to review the proceedings of the county income tax board of review of Eau Claire county relative to plaintiff's income. The plaintiff, a resident of Wisconsin, received during the income year in question dividends from a foreign corporation doing no business in Wisconsin, which dividends were declared in stock out of its earnings and profits accrued since January 1, 1911, but he did not include them in his income report. The taxing authorities included said stock dividends in the plaintiff's taxable income and computed his income tax accordingly.

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This action was set aside by the trial court and such dividends held not taxable.

The constitutional provision in this state as amended in 1908 is as follows:

Art. VIII, sec. 1. "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The original income tax statute, passed in 1911 (ch. 658), provided:

"2. The term 'income,' as used in this act, shall include: . . .

"(d) All dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous or from any business whatever." Sec. 1087*m*—2, Stats.

In 1917 the act was amended, and now reads:

"2. The term 'income,' as used in this act, shall include: . . .

"(b) All dividends derived from stocks and all interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever, provided, that the term 'dividends' as used in this section shall be held to mean any distribution made by a corporation, joint stock company or association, out of its earnings or profits accrued since January 1, 1911, and paid to its shareholders whether in cash or in stock of the corporation, joint company or association." Sec. 1087*m*—2, Stats.

The question is presented for the first time in this court whether under the clause of the constitution already quoted it is competent for the legislature to impose a tax upon the stockholder on account of stock dividends declared by corporations and received by him; in other words, whether a stock dividend may be included within the word "incomes."

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The question whether stock dividends should be treated as income or capital is by no means a new one, but it has generally come before the courts in determining the rights of life tenants and remaindermen. On this subject there have been many decisions and wide differences of opinion. In this opinion it is unnecessary to review the different rulings on this subject, since in a late case Mr. Justice MARSHALL, in a very elaborate opinion, made such a review, classifying and citing many decisions. *Soehnlein v. Soehnlein,* 146 Wis. 330, 131 N. W. 739. There is general agreement in the proposition that when a life tenancy is created by a will or other instrument the intent of the creator of the term must govern. But when no such manifest intent appears it was held by this court in the *Soehnlein Case,* following what is known as the American rule, that when there is an ownership of stock for a term and a remainder over, income accumulated during the term and distributed as dividends, regardless of how distributed, goes to the owner for the term.

It is strongly urged by the attorney general that this decision is decisive of the present case and is a rule of property. It is argued that if the plaintiff had received the dividends as a life tenant while this statute and the decision just referred to were in force, he would have received it as income, and that it would be absurd to deny that it was income subject to taxation. But we are not convinced that the *Soehnlein Case* is conclusive on the issue now before us in construing the constitutional amendment and the statute. The word "income" is a very broad and inclusive term and may not have exactly the same meaning in a will and in a state or federal constitution or a statute. This was well illustrated in two decisions in Massachusetts. In the leading case in that state, decided in 1868, it was declared: "A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital." *Minot v. Paine,* 99 Mass. 101. This was the rule as between life ten-

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ants and remaindermen when an amendment to the constitution was passed in 1915 authorizing a tax on incomes. After the enactment of a statute imposing income taxes on "dividends on shares in all corporations and stock companies," the supreme judicial court held that it was not bound by the decision in the *Minot Case, supra,* but that upon this point the inquiry was as to the intention of the legislature as manifested by the language used. Notwithstanding its former interpretation of the word "income," the court upheld a tax upon gains derived from the sale of rights to subscribe to new shares of a corporation and also upheld an income tax on stock dividends. *Tax Comm'r v. Putnam,* 227 Mass. 522, 116 N. E. 904.

There are very few decisions on the exact question here involved, but they are those of courts of high authority and are entitled to much weight. The case most relied upon by plaintiff is *Eisner v. Macomber,* 252 U. S. 189, 40 Sup. Ct. 189. This case involved a construction of the Sixteenth amendment to the federal constitution, which provides as follows: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," and of an act of Congress declaring that a "stock dividend shall be considered income, to the amount of its cash value." The complaint alleged that in imposing the tax the revenue act violated that clause of the constitution which requires direct taxes to be apportioned according to population and that the stock dividend was not within the meaning of the Sixteenth amendment.

In an able and elaborate opinion Mr. Justice PITNEY, for the majority of the court, reviewed former decisions of the court holding that taxes upon rents and profits of real estate and upon returns from investments of personal property are in effect direct taxes upon the property from which the income arises, imposed by reason of ownership, and that Con-

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gress cannot impose such taxes without apportioning them among the states according to population as required by clauses of the original constitution. It was held that the Sixteenth amendment did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on incomes; that the Sixteenth amendment should not be construed to repeal or modify, except as applied to income, these provisions of the constitution that require an apportionment according to population for direct taxes upon property real or personal. In order to give the original clauses of the constitution proper effect save as modified by the amendment, the court entered into a discussion of the meaning of "income" and "capital" and their relation to each other, giving definitions of each. It was held that the interest of a stockholder is a capital interest of which the certificates are only evidence; that until liquidation or a declaration of a dividend he has no right to withdraw any part of either capital or profits from the common enterprise; that the corporation has full title, legal and equitable, to all the assets; that if profits have been made and not divided they give no claim to the stockholder for any particular sum of money, or any right to any particular portion of the assets or any share in them, until the directors conclude that dividends shall be made and a particular part of the assets segregated from the common fund for that purpose; that until a dividend is paid in money or some other divisible property, or an advantageous sale is made, or until liquidation, the stockholder realizes no gain or profit and derives no profit from the capital invested; that when a surplus exists it may be adjusted on the books by declaring a stock dividend; that this is no more than a book adjustment, in essence not a dividend, but rather the opposite, not altering the proportionate interest of the stockholder, but simply increasing the number of the shares with consequent dilu-

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tion of the value of each; that instead of being a realization of profits it tends to postpone realization, since the fund represented by the new stock has been transferred from surplus to capital; that the original investment and all the accretions still remain the property of the company subject to business risks which may wipe out the entire investment, and the stockholder has received nothing answering the definition of income within the meaning of the amendment; that the stock dividend takes nothing from the property of the corporation and adds nothing to that of the stockholder; although indicating that he is richer by reason of the increase of his capital, it shows that he has not received or realized any income. It is conceded in the opinion that if the stockholder sells the new shares and realizes a profit, such profit is taxable as income.

We have given this partial outline of this decision because it presents in the ablest and most authoritative manner the reasoning against legislative power to tax stock dividends as income. The persuasiveness of the opinion as authority is somewhat weakened by the fact that it is a five-to-four decision, four of the Justices having dissented. Mr. Justice HOLMES and Mr. Justice DAY dissented on the ground that the word "incomes" in the Sixteenth amendment should be read in a sense most obvious to the common understanding at the time of its adoption. It was their view that the known purpose of the amendment was to get rid of nice questions as to what might be direct taxes, and that most of the people not lawyers would suppose when they voted for it that they put the question at rest. Mr. Justice BRANDEIS wrote an opinion, concurred in by Mr. Justice CLARKE, in which the whole subject was ably discussed, holding that the language of the amendment was broad enough to include stock dividends and that the tax should be upheld.

The majority of the court may have been somewhat influenced by the fact that since the case of *Gibbons v. Mahon*,

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136 U. S. 549 (1889), 10 Sup. Ct. 1057, the court had held that, as between life tenant and remainderman, ordinarily a dividend declared in stock is to be deemed capital and a dividend in money is to be deemed income. This decision was analyzed and criticised by Mr. Justice MARSHALL in the *Soehnlein Case,* 146 Wis. 330, 131 N. W. 739, and, as already indicated, a different rule was adopted by this court. The majority opinion in the case of *Eisner v. Macomber,* 252 U. S. 189, 40 Sup. Ct. 189, clearly shows that the Justices felt constrained to give a rather strict construction to the amendment in order to avoid conflict with original clauses in the constitution relating to the levying of direct taxes. In referring to the Massachusetts case sustaining the taxation of stock dividends as income Mr. Justice PITNEY said:

"The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction." Page 217.

The problem is presented to us under quite different conditions. If we follow the rule declared in the *Soehnlein Case,* that in the absence of a contrary direction stock dividends are to be treated as income in all cases, as argued by the attorney general, there is only one alternative, namely, to sustain the statute. Although, as indicated, we do not regard the rule laid down in that case as absolutely controlling in this, since the questions involved are somewhat different, it has an important bearing on the meaning of the word "income" as declared by this court. As between life tenant and remainderman the word has a settled meaning in this state, and we can see no reason for giving a different meaning as between a taxpayer and the state unless it had acquired such different meaning before the constitutional amendment was adopted.

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Before the adoption of the amendment in this state the simple rule prescribed by the constitution was: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Art. VIII, sec. 1. Obviously there is nothing in this language which calls upon us in any way to limit the meaning of the words "incomes" and "privileges," used in the amendment, even if we should hold that an amendment to a constitution should be limited by the terms of a clause in the original document. It is thus evident that some of the grounds relied on in the federal decision do not here apply.

There can be no doubt but it is competent by provision in the constitution, or amendment thereto, to subject stock dividends to taxation. No contention to the contrary is made. It is claimed, however, that they were not included in the word "incomes" and that this was not the intention of those adopting the amendment. It would serve no useful purpose to attempt to analyze the definitions of income as given in the standard dictionaries at the time the amendment was adopted. Very different inferences could be drawn from them, and the differences of opinion among lawyers, judges, and economists are and were quite irreconcilable. It is certain that before that time most of the decisions relating to the rights of life tenants and remaindermen had treated stock dividends as income. It is a matter of common knowledge that stock dividends were generally welcomed by shareholders in about the same manner as cash dividends; that when it was known in advance that stock dividends were to be issued the market value of the stock advanced. Stockholders and the public realized that when such dividends were issued the owner of the stock acquired new and substantial rights. Although his proportionate interest in the assets of the corporation was not increased, he retained his original shares and received others which represented surplus earnings which were added permanently to capital. Al-

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though so long as he held the new certificates his proportionate interest was the same, he was assured that the corporation had made net earnings not liable to be used to pay higher salaries to officers or otherwise diverted from the business of the company. It is optional with him to hold and allow his share of the net earnings to remain permanently in the business or to sell the certificates and obtain their cash value. It is admitted by counsel for plaintiff that if plaintiff had sold the new certificates a tax could have been imposed, because the owner would have had something different from mere paper evidence of the profits earned. He would then have realized his profit.

In the opinion of Mr. Justice PITNEY above mentioned much stress is laid upon the claim that the owner of a stock dividend had not realized his profits and that there can be no tax imposed until a sale. But we consider this objection rather theoretical than practical. Stock dividends actually earned and legally declared have a market value and are easy of transfer. The owner has the option to keep or to sell his stock; but we cannot agree that the right of the legislature to impose a tax upon his profits is to be determined by the exercise or non-exercise of such option. Mr. Justice PITNEY stresses the words "derived" and "from" in the Sixteenth amendment and construes similar words in a definition of income previously adopted by the court as distinguishing the gains taxable under the federal amendment from gains in a general sense. He says:

"*'Derived—from—capital;'*"—"'the *gain—derived—from—capital,'* etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in,* being *'derived,'* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." Page 207.

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But we are under no such restriction. Our constitutional provision subjects to taxation "incomes" without limitation.

The legislature has not undertaken to tax the profits of a shareholder until they are distributed in the form of cash or stock. A statute undertaking to impose an income tax upon increment of value arising from undivided profits would require investigation of the corporate profits and would be more difficult of administration than one imposing the tax after the ascertainment of such profits by the corporation and the declaration of the dividend, and it is not necessary to decide whether such a tax could be imposed. The dividend affords evidence of the stockholder's share in the earnings which have been added to the assets of the company. It was evidently the view of the legislature that the time of receiving such dividends was the most convenient occasion for levying the tax upon the stockholder's interest in the undivided gains and profits of the corporation up to that time, and that the stockholder could be properly taxed upon this increment to his wealth whether evidenced by cash or a stock dividend readily convertible into money.

There might be unlimited argument and refinement concerning the meaning of "income," but we cannot believe that the legislature and the people adopting the amendment gave the word any such technical and restricted meaning as is claimed by plaintiff. It was undoubtedly their intention in adopting this far-reaching amendment to the constitution to shift to a greater degree than before the load of taxation upon those best able to pay. It seems to us incredible that they expected that the gains of stockholders in corporations should be increased indefinitely and that the liability of those gains to taxation should depend upon the manner in which boards of directors should declare the profits. It seems far more consistent with the general purpose of the amendment that they were considering substance rather than form and that they did not intend that the advantages and gains of stockholders derived from their investments should remain

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free from taxation, while other citizens, perhaps less able to pay, should bear the burden.

Although the direct question involved now comes before this court for the first time, the word "income" as used in the amendment under consideration has been given a liberal rather than a technical meaning. *Van Dyke v. Milwaukee*, 159 Wis. 460, 150 N. W. 509; *State ex rel. Howe v. Lee*, 172 Wis. 381, 178 N. W. 471.

In considering the statute involved in this case there is no room for construction. The language is so explicit in giving authority to tax stock dividends that there can be no possible doubt of the legislative intent. In the case of *Tax Comm'r v. Putnam*, 227 Mass. 522, 116 N. E. 904, above referred to, stock dividends were not in express terms made subject to the tax. But the court construed the word in the constitutional amendment and the statute to include them.

If we were to adopt the view of plaintiff's counsel in this case we should strictly construe the constitutional amendment above quoted. But we cannot agree with that view. Clauses in constitutions and their amendments become the paramount and organic law. They state the basic principles on which the fabric of future legislation is to be erected. Three or four lines may remain for generations as the foundation for innumerable and complicated statutes. So long as their spirit and real meaning are not violated they may form the safe foundation for legislation never anticipated by the authors, who could not foresee the new conditions to arise in the changing economic and industrial life. When a clause in a constitution or an amendment confers new broad powers upon the legislature, it is not within the province of the judiciary to whittle down the grant by technical refinements.

More than a century ago it was held by the supreme court of the United States that the question whether a law should be held void for its repugnance to the constitution is at all

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times a question of much delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case. *Fletcher v. Peck,* 6 Cranch, 87. In a later case the rule was stated as follows:

"It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders,* 12 Wheat. 213, 270.

This is the rule which has generally prevailed and which has been too often declared by this court to require the citation of cases.

For these reasons we agree with the conclusions reached by the courts of Massachusetts and New York in *Tax Comm'r v. Putnam,* 227 Mass. 522, 116 N. E. 904; *People ex rel. Pullman Co. v. Glynn,* 130 App. Div. 332, 198 N. Y. 605, 92 N. E. 1097, instead of that which prevails in the federal courts; and we hold that the statute under consideration is valid.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment affirming the assessment of the county income tax board of review, and that the petition be dismissed.

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CASES DETERMINED

AT THE

August Term, 1921.

ADNEY, Plaintiff, vs. KRAUS, Respondent, and KLEKOSKI, Interpleaded, Appellant.

June 1—August 10, 1921.

Contracts: Object of interpretation: Sale of farm and personalty thereon: Limited to property of vendor on farm: Other property: Knowledge of vendee as to ownership: Evidence: Reformation of contract.

1. The "interpretation" of a contract consists in ascertaining the meaning of the words used, the purpose being to give effect to the actual contract entered into by the parties.
2. A contract for the sale of a farm, together with live stock, hay, grain, etc., "everything now on the farm except household goods," must be deemed merely to include personalty belonging to the seller, and not property on the premises not belonging to him.
3. Where a contract for the sale of a farm, including personalty, did not attempt to include personalty on the premises not belonging to the vendor, the question whether the purchaser, who converted timber on the premises which had been previously sold to and cut by a third person, was responsible, or whether the vendor was responsible, depends on whether the purchaser knew of the sale and that the timber did not pass, and for that reason evidence as to his knowledge is admissible in construing the contract.
4. In an action for the conversion of cut timber on a farm, which timber had been previously sold to plaintiff, the evidence is *held* to establish that the purchaser of the farm knew before purchasing that the timber had been sold; hence, though the sale included personalty on the farm, title to the timber which had been cut did not pass.
5. The evidence is also *held* to show that the contract expressed the intention of the parties and that it was not intended to include the timber belonging to a third person which the purchaser converted, and reformation of the instrument is entirely unnecessary to protect the vendor.

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APPEAL from a judgment of the circuit court for Richland county: GUSTAVE G. GEHRZ, Judge. *Reversed.*

This is an appeal by the interpleaded defendant, *Klekoski,* from a judgment rendered in favor of the plaintiff and against said interpleaded defendant, *Klekoski,* for the sum of $579.32 damages and costs.

On the 4th day of February, 1919, and for many years prior thereto, *Klekoski* was the owner of a certain farm, consisting of 187 acres of land in the town of Orion, Richland county, Wisconsin, known as the Dooley farm.

Some time in the month of March, 1917, the interpleaded defendant, *Klekoski,* entered into an agreement with the plaintiff whereby the latter purchased from such interpleaded defendant the right to cut all the standing timber on fifteen acres of the said *Klekoski* farm for a consideration of $400, and under and by the terms of such agreement the said plaintiff had until January 1, 1920, to cut and remove said timber.

Thereafter said plaintiff proceeded to and did cut a large quantity of pole wood, excelsior wood, saw logs, and cordwood, part of which plaintiff removed from the premises and part of which remained on said premises.

On or about the 4th day of February, 1919, *Klekoski,* being then the owner of said land together with a large amount of stock, hay, grain, farm machinery, and other personal property, entered into an agreement in writing with the defendant *Kraus* wherein and whereby he sold the said farm and certain personal property to the said *Kraus.* Said written agreement, among other things, provided as follows:

"This agreement, made this 4th day of February, 1919, by and between *Frank Klekoski,* party of the first part, and *Fred Kraus,* party of the second part, for and in consideration hereinafter mentioned, witnesseth,

"That the party of the first part sells his farm of 187 acres, in the town of Orion, known as the Dooley farm, together with all the live stock, hay, grain, and all feed and

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all farm machinery. The live stock consists of 20 milk cows, 4 two-year-old heifers, 7 spring calves, 1 bull, 7 brood sows, 1 boar, 13 shoats, and 4 horses, everything now on the farm except household goods and vegetables in the cellar, and 1 spring shoat."

The agreement further provides for a consideration of $32,000 to be paid as therein provided. The possession of the farm was to be given about the 1st of March, 1919.

On or about the 5th of March, 1919, pursuant to said agreement, the said *Klekoski* executed and delivered to said *Kraus* a warranty deed of said real estate, together with possession of the articles of personal property referred to in said agreement of sale.

In the fall of the year 1919 the plaintiff sold to a brother-in-law, one Jones, certain cord-wood situated upon said fifteen-acre tract, and on or about the 1st of November, 1919, said Jones endeavored to remove such cord-wood from such tract, whereupon the said defendant *Kraus* objected to the removal of such wood and prevented said Jones from removing the same. Thereafter the said defendant *Kraus* removed considerable of said timber cut by said *Adney* and belonging to him, and sold the same and converted the proceeds to his own use.

The plaintiff thereafter and immediately thereupon commenced his action against the defendant *Kraus* for the recovery of the value of the timber cut by him and appropriated by said *Kraus*.

The defendant *Kraus* answered, admitting the purchase of said farm from the defendant *Klekoski*, and alleged that by virtue of the written agreement entered into on or about the 4th day of February, 1919, he purchased from the defendant *Klekoski* all of the property on said farm, including said timber, with the exception of certain personal property which by the terms of said written agreement was expressly reserved to the said *Klekoski*. The defendant *Kraus* further

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alleged that he had no knowledge whatsoever of the sale of said timber on said fifteen-acre tract to the said plaintiff.

Klekoski was thereupon interpleaded as a party defendant in said action, and a cross-complaint was served by said defendant *Kraus* upon the other parties herein, including the interpleaded defendant, *Klekoski,* wherein he demanded judgment that in the event the plaintiff shall recover a judgment against him for and on account of the appropriation and conversion of said timber, then and in that event such defendant *Kraus* have and recover a judgment against *Klekoski* for the amount adjudged against him in favor of the plaintiff.

There appears no dispute as to the actual sale of the timber on said fifteen-acre tract to *Adney.*

At the opening of the trial *Klekoski* made an application to the court to amend his pleadings, praying for a reformation of the agreement of February 4, 1919, so as to provide for an exception of the timber from the articles of personal property sold by him to *Kraus.* This application was duly granted, and the court thereupon proceeded first to determine the issues raised upon such plea for reformation. At the conclusion of the hearing the court denied the application of *Klekoski* for a reformation of the agreement of February 4, 1919, and a jury was thereupon impaneled and the testimony was thereupon offered and received on the trial of the issues raised by the pleadings.

Kraus objected to the introduction of any evidence tending to explain said written agreement of February 4, 1919, upon the ground that the agreement was complete, that it fully expressed on its face the intentions of the parties; that in and by such agreement all the property upon the farm, including said timber, with the exception of certain articles of personal property provided for in such agreement, passed from *Klekoski* to *Kraus,* and that such agreement was not ambiguous.

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The court, however, received substantially all the testimony offered for the purpose of showing the intentions of the parties in the making of said agreement of date of February 4, 1919, and for the purpose of throwing light upon the question as to whether or not the parties, by said agreement of date of February 4th, intended to convey to said *Kraus*, among other things, the timber belonging to the said *Adney*.

The court thereupon submitted to the jury a special verdict consisting of two questions, to which the jury made answer as hereinafter indicated:

"(1) What was the reasonable market value on or about November 1, 1919, at the fifteen-acre tract in question, of the cord-wood, excelsior wood, pole wood, and saw logs cut by the plaintiff, *Adney*, or his employees, and located upon said fifteen-acre tract on or about that day? *A.* $510.

"(2) Was it intended and agreed by and between the defendants *Fred Kraus* and *Frank Klekoski*, at the time of the execution and delivery of their contract in evidence, dated February 4, 1919, that the cord-wood, excelsior wood, pole wood, and saw logs located upon the fifteen-acre tract in question should be included in the sale agreed upon between them by said contract? *A.* No."

Thereupon the defendant *Kraus* moved the court to change the answer to the second question of the special verdict from "No" to "Yes," and for judgment dismissing plaintiff's complaint as to him, and for his costs in the action.

The motion of the defendant *Kraus* was granted, and thereupon the court ordered judgment in favor of the plaintiff against the defendant *Klekoski* for the sum of $510 damages, together with costs and disbursements, and also ordered judgment in favor of the defendant *Kraus* against the defendant *Klekoski* for his costs and disbursements in the action upon his cross-complaint, and judgment was thereupon duly entered and docketed in accordance with said order of the court.

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E. E. Brindley of Richland Center, for the appellant.
O. D. Black of Richland Center, for the respondent *Kraus*.

DOERFLER, J. The first question presented consists of an interpretation of the February contract.

"An interpretation consists in ascertaining the meaning of the words used. . . . The purpose of all interpretations is to ascertain and give effect to the actual contract entered into by the parties,—the contract which they intended to make and upon which their minds met." 2 Elliott, Contracts, § 1505.

The object and purpose of the agreement, as disclosed by the agreement itself, indicates that the parties had in mind the execution and delivery of a sales contract. This contract, among other things, contains the following: "That the party of the first part sells his farm of 187 acres, . . . together with all live stock, hay, grain," etc.

In and by the terms of the agreement the farm is described as the farm of the seller, and it is but a reasonable implication that by the use of the words "together with all live stock, hay, grain," etc., the parties had in mind the sale of the personal property therein described and mentioned and being the property of the seller. The specification of the live stock following the portion of the agreement above mentioned refers to the seller's live stock, and by using the words "everything now on the farm except household goods and vegetables in the cellar," etc., the parties clearly meant everything on the farm belonging to the vendor with the exception only of the household goods, etc. The expression in the contract, "everything now on the farm," cannot be severed from the balance of the agreement and given a literal meaning independent of the other provisions of the agreement. On the contrary, it must be construed in connection with the balance of the agreement, and must be given

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a meaning in harmony with the object and purpose of the contract and the spirit thereof made manifest thereby.

"The primary object of all rules of interpretation and construction is to arrive at and give effect to the mutual intention of the parties as expressed in the contract when not forbidden by law. . . . All applicable laws in existence when an agreement is made, necessarily enter into and form a part of it, as fully as if they were expressly referred to or incorporated in its terms." 2 Elliott, Contracts, § 1507.

So that, reading this contract in the light of what has been said, and realizing that it is a sales contract, it must be concluded that the parties had in mind the sale of the seller's property and the purchase thereof by the purchaser. Such sale denotes a transfer of the title to the property from the seller to the buyer, and such transfer can only be effected where at the time of the sale the seller has title. "Where the seller has no title he can give none." Williston, Sales, § 130.

The record in this case conclusively establishes the fact that the timber cut on the fifteen-acre tract was sold for a valuable consideration by *Klckoski* to the plaintiff two years prior to the making of the February contract; so that there is no dispute on the question of whether or not *Klckoski* had title to the timber in question at the time he made his sales contract with *Kraus*. He could not, therefore, transfer title to this timber.

It is true that if *Kraus,* at the time of the execution of the February contract, had no knowledge of the sale of this timber to the plaintiff, then by assuming to sell the same *Klckoski* would have represented that he was the owner thereof, and under those circumstances *Kraus,* by buying the timber, would have indicated his reliance on the seller's representations and would have suffered damage by reason thereof. Under such circumstances, if *Kraus* is held responsible for a conversion of the timber, having converted

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it upon a reliance on the implied representations of *Klekoski,* he would be entitled to judgment on his cross-complaint against *Klekoski* for the amount of the plaintiff's recovery.

So that it may be properly concluded thus far:

First. That in and by the February contract it was the intention of the parties to transfer and sell *Klekoski's* farm and his personal property.

Second. That *Klekoski* was not the owner of the timber when the February contract was made.

Third. That inasmuch as this timber was cut from off the farm formerly belonging to *Klekoski,* and lying upon the premises, in the absence of notice to *Kraus,* a proper construction of the February contract would imply an attempted sale on the part of *Klekoski* of this timber.

As to whether or not *Kraus,* at the time of the making of the February contract, had knowledge of the prior sale of the timber to the plaintiff the contract itself is silent. Therefore, in order to construe the contract, it becomes necessary to go beyond the wording of the contract itself and to take cognizance of the surrounding facts and circumstances in regard to the same in order to determine whether or not *Kraus* actually had such notice.

In his cross-complaint *Kraus,* among other things, alleges:

"That on the 4th day of February, 1919, said defendant *Frank Klekoski* was the owner of and in possession of a farm of 187 acres in the town of Orion in said county, together with a large amount of stock, hay, grain, farm machinery, and other personal property, and that on said date the said *Frank Klekoski* and the defendant *Fred Kraus* entered into an agreement in writing, duly signed by the parties, wherein and whereby the said *Frank Klekoski* agreed to sell the said farm and all such personal property, and including everything now on the place, except," etc.

In and by such allegation *Kraus* himself construes the contract to the effect that the phrase "everything now on

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the place" refers to everything thereon owned by the defendant *Klekoski.*

Let us assume that at the time of the sale of this timber to the plaintiff *Kraus* had been present and a witness to the sale. Could he then be heard to say that the February contract constituted an attempted sale of the timber on this fifteen-acre tract to him?

Let us also assume that at the time of the February contract the defendant *Klekoski* had engaged the services of strangers on the farm, who with their plows and horses were engaged in plowing a part of this farm. Would the February agreement convey or would it amount to an attempted conveyance of these horses and plows to *Kraus?* Certainly not. For it is made clear from the very terms of the contract and the object and purposes thereof that it was the intention of the parties to convey the property belonging to *Klekoski* at the time. It might as well be said that an automobile upon the *Klekoski* property belonging to a physician attending members of *Klekoski's* family would also be included in the conveyance.

In order, therefore, to determine whether or not there was an attempted conveyance on the part of *Klekoski* of this timber to *Kraus,* we must look into the facts and circumstances tending to show notice, or lack of notice, of the prior sale of this timber to *Adney,* and it was for the purpose of determining this vital question that the circuit court properly saw fit to submit the second question contained in the special verdict.

Klekoski claims that while at the Bank of Muscoda with *Kraus,* immediately preceding the making and execution of the February agreement, he told *Kraus* and the scrivener, Marcus, that the timber on the fifteen-acre tract had been sold to the plaintiff. This is denied by *Kraus.*

The plaintiff testified that a short time prior to February 4, 1919, he met the defendant *Kraus* upon a train going

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to Muscoda, and that on that occasion the two discussed the prospective purchase by *Kraus* of *Klekoski's* farm, and that the plaintiff at that time expressly told *Kraus* that he had purchased the timber on the fifteen-acre tract from *Klekoski,* to which *Kraus* replied that he knew of it and that he had seen the plaintiff on the tract on several occasions cutting wood.

The plaintiff is not materially interested as to who of the two defendants shall be held liable for the conversion of his timber. Both of the defendants, it is conceded, and the evidence shows, are financially responsible and are able to adequately respond in damages. There is nothing in the record to show that the plaintiff at all times was not as friendly to one defendant as he was to the other. So that when it comes to the consideration of the plaintiff's testimony it must be considered as the testimony of a practically disinterested witness.

Adney also testified that in the month of April, 1919, he met *Kraus* at Muscoda, and that *Kraus* at that time requested of him that he remove certain trees so that he could build a new fence and so as to avoid cut trees from falling upon and injuring the same, and that he also at that time requested the plaintiff to permit certain black walnut trees to remain standing upon the premises.

Kraus in his testimony admits meeting the plaintiff at Muscoda in April and claims that *Adney* at that time told him that he was the owner of the timber on the fifteen-acre tract, but expressly denies the conversation with respect to the removal of the trees on account of the building of a fence and the alleged request to permit certain black walnut trees to remain standing upon the tract.

In the month of November, 1919, one Jones, a brother-in-law of the plaintiff, called at the fifteen-acre tract to remove certain cord-wood purchased by him from the plaintiff, and on that occasion met *Kraus,* who refused to permit

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Jones to remove the wood he had purchased. Shortly thereafter the plaintiff and his son Alvin and said Jones called on *Kraus* and protested the refusal of *Kraus* to permit Jones to remove the wood sold by the plaintiff to him, and *Adney* testified that he said to *Kraus:* "You know I have purchased this timber from *Klekoski,*" to which *Kraus* replied that he knew that, but added that he had also purchased it. This testimony of the plaintiff is corroborated by his son Alvin and by Mr. Jones, both of whom are substantially disinterested witnesses.

Notwithstanding the undisputed and admitted fact in this case that in April, 1919, *Kraus* was notified by the plaintiff that the latter had purchased the timber on the fifteen-acre tract, no inquiry was ever made by *Kraus* from *Klekoski* as to the truth of such statement, and the entire matter was permitted to rest until the month of November, 1919, when the Jones incident above referred to occurred.

During the months of March and April, 1919, according to the testimony of *Adney,* between forty-five and fifty cords of wood were removed from the fifteen-acre tract by himself and his son. It was testified also by the plaintiff and by one Frank Bob and one Olin Fazel that the removal of wood from the fifteen-acre tract was clearly visible from the house occupied by *Kraus.* *Kraus* himself admitted that if forty-five or fifty cords of wood had been removed as testified he would have noticed it. During these months, according to the testimony of *Kraus,* he passed this fifteen-acre tract on his way to Muscoda once or twice during each week.

This testimony clearly and persuasively indicates that at the time of the making of the agreement of February 4, 1919, *Kraus* had knowledge of the sale of the timber on the fifteen-acre tract. The testimony on the subject is overwhelming and is supported by the surrounding facts and circumstances of the case. It would be abundantly sufficient to establish notice and constitutes clear and satisfactory

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evidence sufficient to warrant a reformation, if a reformation were necessary.

We therefore conclude that, inasmuch as *Kraus* had knowledge of the prior sale of the timber to *Adney,* it was the intention of the parties, in and by the agreement of February 4th, to transfer only such property upon the farm as at the time belonged to the seller, and that the answer of the jury to the second question of the special verdict was fully warranted by the credible evidence in the case, and that the court erred in changing such answer from "No" to "Yes" and in ordering judgment as above recited.

Under the circumstances we do not feel that it is necessary to reform the agreement of February 4th, as prayed for by the defendant *Klekoski.* Had we concluded that such reformation was necessary in order to grant the relief prayed for in the answer of the defendant *Klekoski,* we would have ordered the agreement reformed, for we are satisfied that the clear preponderance of the credible evidence shows conclusively that it was not the intention of the parties, at the time of the making of the February agreement, to include in the sale the timber situated on the fifteen-acre tract.

In accordance with the foregoing, the judgment of the circuit court is reversed, and judgment is ordered in favor of the plaintiff and against the defendant *Kraus* for the sum of $510 damages, together with his costs and disbursements of the action, and judgment is also further ordered dismissing the cross-complaint of the defendant *Kraus,* and for judgment in favor of the defendant *Klekoski* against said defendant *Kraus* for his costs and disbursements.

By the Court.—It is so ordered.

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ELMERGREEN, Appellant, vs. KERN, Respondent. [Two appeals.]

January 11—February 8, 1921.
April 7—September 23, 1921.

Appeal: Time when appeal lies: Perfection of judgment: Insertion of costs: Compromise and settlement: Forbearance to sue as consideration: Requisites: Trial: Judgment notwithstanding verdict.

First appeal:

1. Though sec. 2861, Stats., provides that the clerk of the trial court, upon receiving a verdict, enter a judgment in conformity therewith, such judgment is not perfected so as to be appealable until costs, which constitute a part of the judgment, are ascertained and included therein or the time limited for their insertion has expired, notwithstanding sec. 3039 limits the time in which an appeal may be taken to one year from the date of entry of the judgment, and provides that such year shall begin to run immediately from the entry of the judgment, regardless of the time when the costs are taxed and inserted.

Second appeal:

2. In order that the settlement of a claim constitute a valid consideration for a compromise or a promise, the claim need not be one which could be successful if prosecuted, but it must not be made in bad faith or be frivolous or vexatious.
3. The decision of the trial court that the evidence is insufficient to take the case to the jury or that a verdict of a jury should be set aside, should be disturbed only where clearly wrong.
4. Where the evidence is insufficient to support a special verdict of the jury and its sufficiency is challenged by all the usual motions before and after verdict, judgment may be entered notwithstanding the verdict and without the court changing the answers found by the jury.

APPEALS from a judgment of the circuit court for Milwaukee county: BYRON B. PARK, Judge. *First appeal dismissed; judgment affirmed on second appeal.*

On January 11, 1921, the respondent moved to dismiss appellant's first appeal.

Irving A. Fish of Milwaukee in support of the motion.

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Contra, Horace B. Walmsley of Milwaukee.

On February 8, 1921, the motion to dismiss was granted, and the following opinion was filed February 15, 1921:

PER CURIAM. The respondent moves to dismiss the first appeal taken in this action because it was taken before the costs were taxed and inserted in the judgment. "Costs constitute a part of the judgment, and I do not think it can be deemed perfected until they are ascertained and included." *Cord v. Southwell,* 15 Wis. 211; *Fowler v. Metzger S. & O. Co.* 131 Wis. 633, 111 N. W. 677.

A judgment is not perfected so as to be appealable unless the costs are ascertained and inserted, or until the time limited by statute for so perfecting the judgment has expired. *Joint School Dist. v. Brighton,* 68 Wis. 246, 32 N. W. 42; *Hoye v. C. & N. W. R. Co.* 65 Wis. 243, 27 N. W. 309, 310; *Smith v. Hart,* 44 Wis. 230; *Wheeler v. Russell,* 93 Wis. 135, 67 N. W. 43.

It is declared in the *Wheeler Case:*

"The taxation of costs at common law related to the date of the judgment, which was the time of the record of the judicial decision in the record book of the proceedings of the court, and the date of that entry was the date of the judgment."

Sec. 2861, Stats., regulates this practice by providing that, unless a different direction be given by the court, the clerk upon recording a verdict must enter judgment in conformity with it. Such judgment so entered is not an appealable one, as above indicated, until perfected by the insertion of the costs by the prevailing party or until the time limit for inserting them has expired. The claim that ch. 400, Laws 1913, amending sec. 3039, Stats., operated to change the established rule that no appeal may be taken from a judgment before costs are inserted or forfeited by limitation of time, is not well founded. The language of the amendment clearly

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indicates that no other change was attempted to be effected than to change from *two* years to *one* year the time within which a writ of error may be issued or an appeal taken, and that such year shall begin to run immediately from the entry of a judgment regardless of the time when costs are taxed and inserted. The terms of the amendment clearly do not affect the question that a judgment is not appealable until perfected by the insertion of the costs of action.

It follows that the first appeal was prematurely taken and must be dismissed.

Second appeal.

Action for damages for breach of contract to transfer stock in a mining company, in consideration of which it is alleged plaintiff agreed not to prosecute a cause of action. Trial before a jury resulted in a special verdict in favor of plaintiff. Judgment was given for defendant notwithstanding the verdict. Plaintiff appeals.

The complaint in substance alleges that in 1904 plaintiff and defendant were interested in the Michigan Ore Company, a Utah corporation; that through frauds of its officers the mining claims belonging to the company were transferred to the Ophir Tunnel Company, another corporation, without consideration, and that defendant took stock in the latter company and acquiesced in the transfers; that afterward defendant and others organized the Cliff Mining Company, which purchased the shares of the Michigan Ore Company. The complaint further alleged:

"That the plaintiff set about certain proceedings and preparation to secure his rights, and instituted litigation in the courts of the state of Utah, and the plaintiff was about to cause proceedings to be commenced to set aside said transfers to the Cliff Mining Company, and informed the defendant of his intention. That the defendant being then largely interested in the said Cliff Mining Company, and desirous that no action be commenced that would affect the value of his investment therein, proposed to the plaintiff

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in June, 1906, that in consideration that the plaintiff would refrain from bringing further action against the said Cliff Mining Company and the defendant, and in consideration that the plaintiff would turn over to the defendant for his inspection and temporary use certain documents, letters, memoranda, etc., which defendant desired to use to obtain certain information then valuable to the defendant in certain litigation with one John B. Weimer, that he, the said defendant, would secure for and cause to be transferred to the plaintiff an amount of stock in the said Cliff Mining Company equivalent in value to the plaintiff's rightful interest in the said land, claims, rights, and properties which the plaintiff had and was entitled to therein by virtue of his holdings of the stock of the Michigan Ore Company.

"That thereupon the plaintiff accepted the said proposition of the defendant and turned over to the defendant the said certain documents, letters, memoranda, etc., as requested by the defendant, and the plaintiff refrained from bringing further action against the Cliff Mining Company and the defendant concerning the transfer of said claims, lands, rights, and properties."

The answer denies many of the allegations of the complaint and specifically denies the alleged agreement between the parties.

In 1903 the plaintiff and defendant, who were related by marriage, both resided in Milwaukee and were solicited by their cousin John Weimer to become investors in mining stocks. In 1904 they both became interested in the Michigan Ore Company, a company supposed to own certain mining claims in Utah, and both acquired their interests from Weimer. The respondent had 25,000 shares of the nominal par value of $1 each. The appellant owned 50,000 shares for himself and as trustee, but owing to difficulties between him and Weimer they were never transferred on the books of the company. An agreement had been made between appellant and Weimer by which the appellant was given a one-tenth interest in certain mining claims which Weimer then had under bond. This agreement provided that Weimer

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might transfer the claims to a stock company or incorporation, acting on his own judgment without consulting the appellant, and that appellant should take one tenth of the stock of the company to which the claims were transferred, less the treasury stock, for his one-tenth interest in the claims. The appellant, therefore, from the record appears to have had a demand against Weimer in the first instance for one tenth of the stock of the Michigan Ore Company, less the treasury stock. Weimer declined to recognize appellant's right to this one-tenth of the Michigan Ore Company's stock, claiming that appellant had been repaid the money he had originally advanced at the time the agreement was executed, but finally satisfied that demand of the appellant by giving the appellant 50,000 shares of stock in the Michigan Ore Company, that being the company to which he had transferred the claims.

In October, 1904, another company, the Ophir Tunnel Company, was organized, and subsequently stock in this company was exchanged for stock in the Michigan Ore Company share for share, but the shares in the Ophir Tunnel Company so exchanged were obtained not from the latter company but from Weimer. Although Weimer exchanged Ophir Tunnel Company stock for Michigan Ore Company stock with other stockholders, he refused to exchange with appellant for the reason, as he claimed, that he had been paid back all the money he had put in. Weimer testified: "I didn't give the plaintiff, *Elmergreen,* any Ophir Tunnel Company stock, because he didn't have any of his eggs in our basket. He had nothing coming, he had no money in the deal, not a five-cent piece."

When appellant asked to have his stock transferred on the books of the Michigan Ore Company the request was refused, and he brought suit in 1905 against both the companies, Weimer, and others, not including respondent. In this action plaintiff claimed that many frauds had been

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committed by Weimer and others connected with the two companies and that the property of the Michigan Ore Company had been fraudulently and illegally transferred to the Ophir Tunnel Company and asserted his right to stock in the latter company. This action was finally tried and a decree rendered wholly adverse to appellant on or about October 6, 1908. In the year 1906 the Cliff Mining Company was organized. It was not organized to take over the property of the Ophir Tunnel Company, but subsequently acquired it, exchanging stock on the basis of eighteen and two-tenths shares of the latter for one of the Cliff Company. The respondent became actively interested in the Cliff Company and became one of its officers. It was one of the main contentions of the appellant that he agreed not to press the litigation pending in Utah and would turn over and did turn over to respondent all of appellant's papers relating to the litigation, and that this was part of the consideration for respondent's promise.

The following question was submitted to the jury:

"(1) Was there an agreement between the plaintiff and the defendant that, if the plaintiff would not press his Utah suit then pending, would refrain from bringing further action or actions, and would turn over to the defendant for his inspection and use all his papers relating to said Utah suit and mining claims in Utah, the defendant in consideration therefor would transfer to the plaintiff an amount of stock in the Cliff Mining Company equivalent in value to his rightful interest as represented by his 50,000 shares of the Michigan Ore Company?"

To this the jury answered Yes. In answer to the second question it was found that appellant performed his part of the agreement, and in answer to the third the damages were assessed at the sum of $27,472.52. At the close of the testimony respondent moved for a directed verdict. This motion was denied and the case was allowed to proceed to a verdict with the understanding that the motion would be

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renewed after verdict. After the verdict respondent moved that the answers to the first and second questions be changed and the answer as to damages be changed to a nominal sum and for an order for judgment notwithstanding the verdict, also for an order vacating and setting aside the verdict and for judgment on the uncontradicted evidence.

The court did not consider that the second and third answers were sustained by the evidence, but allowed the verdict to stand and granted respondent's motion for judgment notwithstanding the verdict.

For the appellant there were briefs by *Joseph G. Hirschberg* and *Horace B. Walmsley,* both of Milwaukee, and oral argument by *Mr. Walmsley.*

Alfred Kay, attorney, and *Irving A. Fish,* of counsel, both of Milwaukee, for the respondent.

The following opinion was filed May 3, 1921:

JONES, J. The labor involved in considering the appeal in this intricate and complicated case has been greatly increased by the very unusual manner in which it is presented to us. The record consists of about 990 pages. The oral testimony consists of about 600 typewritten pages. The remainder of the record is made up of pleadings, letters, corporate and other records, and miscellaneous exhibits. In the thirty-three pages of the printed case there can be of course only the most meager and inadequate abridgment of the evidence, and in order to arrive at a conclusion we have been compelled to go through the voluminous record with but little aid from the printed case. Both briefs, however, contain the careful and full decision of the trial court, which throws much light upon the mass of testimony.

The action has been pending for ten years of more. On the appeal of the defendant from a judgment in a former trial the judgment was reversed on the ground that the judgment in the Utah case above referred to was not allowed

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to be received in evidence. 167 Wis. 560, 168 N. W. 407. In the opinion Mr. Justice ROSENBERRY said:

"It appears from the record in this case that a very large part of the consideration for the contract which plaintiff claims the defendant here entered into was the withdrawal of the Utah suit. It also appears from the record that the information which plaintiff had, and which he agreed to turn over in part performance of his contract with the defendant, related to the so-called California claim and could not have been of very substantial value for the reason that the defendant or his company was thereafter obliged to pay $20,000 in settlement of claims based upon the adverse ownership of the California claim. If the record in the Utah suit had been received and the whole case were before us, a very serious question as to the right of the plaintiff to recover any damages other than for the value of the memoranda furnished in reference to the California claim would be presented. Had the record in the Utah action been received, the plaintiff might have offered further proof: so that the record as it stands is incomplete. The whole matter not having been presented, it cannot now be determined."

In the last trial the judgment was received in evidence, and in the finding and decree, among other things, it was determined that the defendants, including Weimer, were not personally liable to the plaintiff upon any of the matters set forth in the complaint in that action; that at the time of the organization of the Michigan Ore Company the mining claims owned by it were not worth more than $2,500; that the company was indebted for that amount, and that the company at regular meetings of its officers sold the same to the Ophir Tunnel Company for $2,500 in good faith in order to pay debts for labor, and that said sale was necessary and regular in all respects and was ratified by the stockholders; that on the 18th day of October, 1904, plaintiff was the owner in his own right and as trustee for others of 50,000 shares of the Michigan Ore Company, but the same did not stand in his name and he neglected to surrender the

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certificate so the same could be transferred in his name, and that he did not pay anything of value for the stock.

It is now the law of the case that the Utah judgment was properly received in evidence, and appellant's counsel make no claim that as against him it is not conclusive so far as it relates to the interest he asserted in the corporations named in the decree and in the mining claims acquired by them. In other words, it is a verity that the appellant had no interest in either the Ophir Tunnel Company or the Cliff Mining Company, and no valid claim against either of them, and we agree with the trial judge that the evidence discloses that at the time of the alleged agreement the appellant had no valid cause of action against the respondent or the Cliff Company.

The claim that one of the valid grounds for the promise alleged to have been made by respondent was that appellant was threatening to sue the Cliff Company seems largely negatived by the fact that this company was not then in existence and was not organized until months after the promise is said to have been made. The documents described in the complaint which were delivered to the respondent at the time of the alleged agreement were returned on request and it does not appear that they were of any value or service to the respondent.

The documentary evidence demonstrates that appellant did not delay his suit in Utah, but on the contrary pressed it to defeat. It seems unnecessary to discuss in detail the evidence contained in the voluminous record, but after careful examination we are satisfied that the following statements by the trial judge in his decision are fully justified:

"There are in the record many and sometimes startling 'contradictions' in the testimony of the plaintiff disclosed by his testimony on this trial, the first trial, and his letters to divers people."

"There is also considerable shifting of ground and position on his part on divers propositions, including that of the

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alleged contract between himself and the defendant, on which this action is based."

It is true the appellant testified on the last trial that the promise set up in the complaint was made and respondent emphatically denied it. They were the only witnesses to the transaction. But the contradictions in the appellant's testimony, the inconsistent positions he has assumed before and since the litigation commenced, and the relations of the parties to each other and to the companies involved were such as to justify the conclusion of the trial court that it was incredible that respondent made the agreement alleged. The decision of the trial court contains this statement:

"A careful consideration of all the evidence, including a great mass of exhibits, consisting of correspondence, documents, records, abstracts, etc., leads to the conclusion that no consideration whatever passed to the defendant for the agreement or promise which plaintiff alleges defendant made with him."

Appellant argues that "forbearance to prosecute any cause of action is a sufficient consideration to support any contract." The early English decisions held that the forbearance or promise to forbear to prosecute an unfounded claim was not a sufficient consideration, and there have been many decisions in this country holding to that rule. But that is not the rule which now generally prevails nor is it the law in this state. In order to form a valid consideration for a compromise or promise the claim need not be one which could be successful if prosecuted. In *Kercheval v. Doty,* 31 Wis. 476, where there was a compromise of a pending suit, Mr. Chief Justice DIXON thus declared the rule:

"To close the doors of dispute, therefore, and preclude all future investigation into the merits of the claims settled, these things only are requisite: that the claims should have been in some doubt and their validity controverted; that they should have been asserted in good faith; and that there should have been no fraud, undue advantage, or mistake

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in the settlement." Page 485. See, also, *Zimmer v. Becker*, 66 Wis. 527, 29 N. W. 228; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884.

Forbearance to sue is not a good consideration if the claim is made in bad faith or is frivolous or vexatious. 1 Page, Contracts (2d ed.) sec. 617. "If the claim is known by the claimant to have no foundation, it is clear that the forbearance to prosecute the claim is not valid consideration." Williston, Contracts, § 135 and cases cited.

Like thousands of others who have dealings in mining stocks about which they have no personal knowledge, appellant had been disappointed. He may have had a just grievance against Weimer, although the Utah court found he had none; but we can find in the long record no shadow of excuse for the belief on the part of the appellant that in December, 1905, the date of the alleged promise, he had any cause of action against the respondent or the Cliff Company, which was not then in existence. We agree with the trial judge that there was no consideration for the alleged promise.

In view of the conclusion we have reached it is unnecessary to discuss the question of damages.

It is ably and earnestly argued by appellant's counsel that the findings of the jury as to the contract between the parties was conclusive and that judgment for the appellant should have followed upon the verdict. We are by no means unmindful of the force of this argument or the weight to be given to the answers of juries in special verdicts. In this case there was a very great amount of documentary evidence not easy of comprehension by a jury, and yet necessary to be considered in reaching a conclusion as to the credibility of the two main witnesses. There were such contradictions between the written evidence and the oral testimony of appellant and such inherent impossibilities in his testimony that the trial court might justly come to the conclusion that

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his evidence as to the alleged contract was not credible. The decision of the trial judge evinces that he had given careful attention to the complicated facts of the case. Our duty under such circumstances was well expressed by Mr. Chief Justice WINSLOW as follows:

"It is considered that these cases and perhaps others containing like language were all intended to express and do in fact express the same general idea, namely, that when the trial judge rules, either on motion for nonsuit, motion for a directed verdict, or motion to set aside the verdict, that there is or is not sufficient evidence upon a given question to take the case to the jury, the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong. It is also considered that this is an entirely reasonable and salutary principle; a principle upon which the court has acted in the past and expects to act in the future; a principle which gives due weight and dignity to the decision of the trial judge and demands of him his best and most conscientious service whenever such a question is presented." *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 432, 140 N. W. 30. See, also, *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Jeffers v. G. B. & W. R. Co.* 148 Wis. 315, 134 N. W. 900; *Rogers v. Brown,* 143 Wis. 472, 128 N. W. 64; *Riger v. C. & N. W. R. Co.* 156 Wis. 86, 144 N. W. 204; *Meyst v. Frederickson,* 146 Wis. 85, 130 N. W. 960; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513; *Hanson v. C. V. & N. R. Co.* 150 Wis. 104, 135 N. W. 488.

Appellant's counsel argue that since the trial court did not change the answers in the special verdict the appellant was entitled to judgment for the sum assessed as damages. As appears from the statement of facts, the respondent made all the usual motions both before and after the verdict by

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which the sufficiency of the evidence could be challenged. The court held, following the practice approved in *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800, that although answers in the special verdict had not been changed, judgment could be entered for respondent notwithstanding the verdict. See, also, *Hay v. Baraboo*, 127 Wis. 1, 105 N. W. 654. On this point appellant's counsel rely on the case of *Maxon v. Gates*, 136 Wis. 270, 116 N. W. 758. But there the requisite motions were not made and the decision seems to be based on that ground. We hold that the objection is not well taken.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

A motion for a rehearing was denied, with $10 costs, on September 23, 1921.

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ABUSE OF DISCRETION. See DISCRETION.
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ACTION.

Severance: Discretion of court.

1. Where several causes of action are pleaded, the court in its discretion may order a severance. *Rohloff v. Folkman,* 504
2. The power of the court to order a severance of causes of action rests in its sound discretion, which will not be disturbed, when exercised, unless there is a manifest abuse thereof; and although an order sustaining a demurrer for misjoinder of causes of action would, under secs. 2649, 2686, Stats., have practically the same result, an order requiring a severance cannot for that reason be treated as in effect an order sustaining a demurrer, and is therefore not appealable under sec. 3069. *Ibid.*

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ADMIRALTY.

See NEGLIGENCE, 3.

Concurrent jurisdiction of state and federal courts.

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See WITNESSES, 6.

Use at trial.

1. Where an employee of an adverse party was examined before trial under sec. 4096, Stats., as to statements made by him in an affidavit, without the affidavit itself being offered at the time of such examination, the affidavit was not admissible as independent evidence at the time of the trial. *Thomas v. Lockwood Oil Co.* 486

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2. Under sub. 2, sec. 4096, Stats., as amended by ch. 246, Laws 1913, testimony of defendant's employee, taken by plaintiff before trial under such statute, was not available to defendant during the trial in the absence of a showing that such employee could not attend the trial as a witness. *Ibid.*

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ALIMONY. See DIVORCE, 5.

ANNULMENT.
Of marriage. See MARRIAGE.
Of contract. See PRINCIPAL AND AGENT, 10.

APPEAL AND ERROR.

Jurisdiction of appellate court.

1. Where at the time the circuit court quashed an alternative writ of *mandamus* relief thereby was available, this court on appeal obtained jurisdiction to determine all questions involved in the litigation, though the peremptory writ of *mandamus* as prayed for is of no avail at the time of the appeal. *State ex rel. Hathaway v. Mirlach,* 11
2. Failure to raise the objection that there is no right of appeal to the supreme court from a judgment annulling a marriage, until after the decision of that court, or even the respondent's express or implied consent to have the hearing, would not confer jurisdiction on the supreme court if in fact there is no right of appeal. *Hempel v. Hempel,* 332
3. Under secs. 2820, 2821, Stats., relative to the service of papers, sec. 2836*a*, relating to the waiver of objections, and sec. 3049, relating to service of notice of appeal, the respondent, by admitting service of copies of the printed case and brief and stipulating for a continuance of the hearing of an appeal, waived any right to question the jurisdiction of the court because notice of the appeal was served by mail instead of personally. *Sauer Hide Co. v. Stein,* 185

Right to appeal.

4. An appeal from a judgment annulling a marriage is an appeal from a judgment in a civil action, and the right to an appeal is included in the general statute providing for appeals (sec. 3039, Stats.). *Hempel v. Hempel,* 332
5. Sec. 3041, Stats., does not grant or create a right of appeal, but provides an additional limitation within which an appeal from a judgment in a divorce action may be taken. *Ibid.*

Same: Waiver of objections.

6. Under sec. 3049*a*, Stats., providing that if one of several parties bound by the same judgment appeals therefrom he shall serve his notice of appeal on all parties bound with him by the judgment, one appealing from a judgment must serve his notice of appeal upon all who are bound by the judgment,

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and those so served shall within thirty days thereafter take and perfect their own appeals or be deemed to have waived their right. *American W. Co. v. McManus,* 300

Appealable order. See ACTION, 2. CONTEMPT, 1. PROHIBITION, 2.

7. Sec. 2836*a*, Stats., providing that, when an appeal is attempted to be taken in an action in which an appeal is authorized and return is duly made, respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or the jurisdiction of the appellate court unless he shall move to dismiss before taking or participating in any other proceedings, applies to attempted appeals to the supreme court. *Sauer Hide Co. v. Stein,* 185

Time of taking appeal: Extension.

8. Though sec. 2861, Stats., provides that the clerk of the trial court, upon receiving a verdict, enter a judgment in conformity therewith, such judgment is not perfected so as to be appealable until costs, which constitute a part of the judgment, are ascertained and included therein or the time limited for their insertion has expired, notwithstanding sec. 3039 limits the time in which an appeal may be taken to one year from the date of entry of the judgment, and provides that such year shall begin to run immediately from the entry of the judgment, regardless of the time when the costs are taxed and inserted. *Elmergreen v. Kern,* 622

9. Under sec. 3049*a*, Stats., providing that the supreme court may, at any time after an appeal is taken, bring in additional parties, one bound with an appellant by the same judgment may be brought in and allowed to perfect his appeal after the lapse of thirty days, the section being in the nature of a default rather than a statutory bar, and the courts having broad powers to relieve defaults. *American W. Co. v. McManus,* 300

10. A defendant who brings in a third party who will be liable over to defendant in case he is held liable to plaintiff should, upon an appeal by the plaintiff from the judgment in the original action, appeal from that portion of the judgment dismissing his cross-complaint, orderly practice requiring that the controversy raised by the cross-complaint be brought up on appeal so that this court may terminate the entire controversy. *Ibid.*

Exceptions: Waiver: Questions reviewed.

11. In a proceeding by an executrix for the allowance of her account, where there is no bill of exceptions and no exceptions were taken in accordance with secs. 2870, 3070, Stats., the only question before this court is whether the judgment is sustained by the pleadings in the case. *Will of Britt,* 145

12. Where the court made no findings of fact and conclusions of law under sec. 2863, Stats., but his opinion contained statements of fact, and appellant took no exception to the failure to find the facts separately and in her brief referred to the facts stated in the opinion as found by the court, she was not

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misled, and such statements of fact may be considered as equivalent to findings of fact and given the weight accorded such findings. *Ibid.*

13. Under sec. 4031, Stats., authorizing a direct appeal from the county courts of certain counties to the supreme court. formal findings of fact and conclusions of law as provided by sec. 2863 are as important in those county courts from which an appeal lies directly to the supreme court as in the circuit and other courts. *Ibid.*

Same: Bill of exceptions: General exceptions.

14. A bill of exceptions can be settled after the time for an appeal has expired, without stipulation by the parties to the action. where proper extension of time has been made, under secs. 2831, 2876, Stats. *Behnke v. Kroening,* 224

15. An exception, "Plaintiff excepts to the findings and conclusions of law herein dated April 8, 1919," was wholly insufficient to entitle appellant to a review of the evidence to determine whether or not the findings were supported by the evidence. *Ibid.*

Review: Questions of fact: Verdicts and findings.

16. The verdict of a jury cannot be set aside if supported by any credible evidence; and a judgment of the civil court of Milwaukee county should not be reversed by the circuit court in the absence of error such as would justify a reversal of the circuit court by the supreme court. *Schulteis v. Milwaukee C. M. Co.* 358

17. The decision of the trial court that the evidence is insufficient to take the case to the jury or that a verdict of a jury should be set aside, should be disturbed only where clearly wrong. *Elmergreen v. Kern,* 622

18. The rule that the appellate court will not overturn findings of the trial court unless against the clear preponderance or the great weight of the evidence does not apply to findings which are general in their nature. *Weinhagen v. Hayes,* 233

19. A finding based on ample evidence must be considered as a verity in the case. *Wagner v. Larsen,* 26

Same: Harmless or prejudicial error. See CRIMINAL LAW, 1, 4. PARENT AND CHILD, 2. PHYSICIANS. RECEIVING STOLEN GOODS, 3. TRIAL, 4.

20. The placing of the burden of proof on the wrong party, where the jury finds against him, is prejudicial error. *Sloan v. Brown County State Bank,* 36

21. The fact that the trial court gave an incorrect instruction to an advisory jury which may have misled them could not be the foundation for prejudicial error upon appeal, where the trial court in its opinion declared that such incorrect rule had been given to the jury, but then proceeded to make its findings under the evidence upon all the issues in view of such misdirection of the jury. *Behnke v. Kroening,* 224

22. It was not prejudicial error, in a trial before the court, to receive evidence of a conversation between defendant and a third person in plaintiff's absence, where the facts involved

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in the conversation were abundantly supported by other competent evidence. *Ibid.*

Disposition of case: Issues not litigated. See DIVORCE, 9. FACTORS, 3. TAXATION, 18.

23. Where a judgment for plaintiffs is reversed for failure of the evidence to show notice to the city of the defect complained of, a new trial will be granted where it appeared that such issue was not litigated at the former trial and the attention of the court and parties was not directed thereto. *Strang v. Kenosha,* 480

Affirmance and reversal. See ACTION, 2. CONTEMPT. DIVORCE, 2-4. FACTORS, 3. INSURANCE, 9. NEW TRIAL. TAXATION, 18. TRIAL, 3. WITNESSES, 1.

24. Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment or order appealed from will be affirmed. *South Side M. C. Co. v. Four Wheel Drive A. Co.* 93; *Kahn v. Malaney,* 95

Rehearing.

25. A second application for a rehearing was denied as not proper practice. *Weinhagen v. Hayes,* 233

APPRAISAL. See TAXATION, 6.

ASSAULT AND BATTERY.

Inadequacy of damages.

Where defendants assaulted plaintiff and beat him into unconsciousness, causing a scalp wound which bled profusely and reopened about six months afterwards, plaintiff being in bed from the assault for twenty-seven days and under a doctor's care for six months, and though strong and healthy prior to the assault was not subsequently in good health and could not work regularly or command a man's pay, and had pains in his head quite often, a verdict for $60 was wholly inadequate. *Bruno v. Hickman,* 63

ASSIGNMENTS.

See EASEMENTS, 2.

In whose name action must be brought.

1. At common law, in case of an assignment, the action must be in the name of the assignor though the judgment will inure to the benefit of the assignee. *Peavey v. Loveland,* 57
2. The guarantor of a note secured by a mortgage cannot complain that a personal judgment against him on his guaranty was taken in form in favor of the payee, although the payee had assigned the note, mortgage, and judgment of foreclosure to a trustee. *Ibid.*

Assignment of insurance policy. See INSURANCE, 5. TAXATION, 2.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 9-14.

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AUTOMOBILES.

See DAMAGES, 2. HIGHWAYS. MASTER AND SERVANT, 1-8. MUNICIPAL CORPORATIONS, 24-29.

Injuries to pedestrians: Rights of travelers on highway.

1. Under sec. 1636—51, Stats., giving operators of automobiles equal rights on all public highways with all other users of such highways, a foot passenger is not entitled to a right of way on a regular street crossing as against an approaching automobile, but each must exercise ordinary care and yield when danger is imminent. *Grimes v. Snell,* 557
2. An erroneous instruction that a pedestrian had the right of way at a street crossing was not cured by other portions of the same charge to the effect that it was the duty of the pedestrian to use ordinary care and prudence in crossing the street, but that, if the pedestrian observed that the street was clear for a distance greater than could be covered by a vehicle operated at a lawful rate of speed in order to reach the pedestrian's line of travel, she might proceed to cross the street on the assumption that vehicles not within such distance would be operated in a lawful manner. *Ibid.*
3. In an action for injuries to a pedestrian, testimony on behalf of the defendant that his automobile was operated at such speed that it must have been in plain view when plaintiff attempted to cross the street, is *held* to raise a question for the jury whether the plaintiff was contributorily negligent in attempting to cross ahead of the car, notwithstanding her testimony that she looked but did not see the automobile. *Ibid.*

Same: Concurring negligence of third person: Proximate cause.

4. In an action for damages suffered by a pedestrian struck by an automobile whose driver was in a cloud of steam and vapor emitted into the highway from the defendant's engine, which was lawfully engaged in work in the street, it is *held* that the jury, in finding that the defendant was negligent in permitting the steam to escape into the street, found negligence in the manner in which the plant was arranged and constructed as alleged in the complaint. *Pisarke v. Wis. T. & C. Co.* 377
5. Where the steam in the street made travel on the public highway dangerous, the negligence of one who drove an automobile through the steam to plaintiff's injury and the negligence of the construction company concurred in causing the injuries complained of; and the act of the automobile driver was not an intervening cause breaking the causal connection between the act of the defendant and the injuries to plaintiff. *Ibid.*

Collision with horse-drawn vehicle: Law of the road.

6. In an action to recover for injuries sustained in a collision between plaintiff's automobile and a coal sleigh, where there was no evidence that plaintiff was driving at an excessive rate of speed, and there was evidence tending to show he

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was traveling on the right side of the street near the curb, the question of contributory negligence is for the jury. *Wagner v. Larsen,* 26

7. An automobile proceeding west on a city street had the right of way over a team going north on an intersecting street; and even if plaintiff, who was driving the automobile, had seen the team approaching, he was under no obligation to yield the right of way or assume that the driver of the team would not yield to him. *Ibid.*

Negligence of driver: Effect on passenger: Husband and wife.

8. A husband and wife moving to another city, where the husband intends to teach and the wife to attend college with a view of obtaining a position, are not engaged in a joint enterprise so as to impute to the wife the negligence of the husband while driving in an automobile to the city to which they were moving. *Brubaker v. Iowa County,* 574

9. A relation of agency, or such joint financial interest in an undertaking as to make a husband's negligence imputable to his wife, will not be presumed; and the negligence of the husband is not imputable to the wife merely because of the marital relation, when they were not engaged in a joint enterprise and the wife has no direction or control over the husband's movements. *Ibid.*

10. The wife was not guilty of contributory negligence in failing to see signs warning of the dangerous condition of the road, or in failing to protest at the rate of speed at which the husband was driving, where the jury found on sufficient evidence that there were no signs which would warn an ordinarily prudent traveler and there was no evidence that the plaintiff, who was in the rear seat, could have formed an intelligent judgment as to the rate of speed. *Ibid.*

11. Nor is the wife, while thus riding with her husband over a road apparently in good condition, bound to pay constant attention to the management of the car or to keep a constant lookout for imperfections in the road, though if she sees that he is driving at a dangerous rate of speed or in violation of the law reasonable care requires a protest. *Ibid.*

12. A new trial will not be granted, after judgment for plaintiff, to enable the county to interplead the husband as a defendant and have contribution from him. *Ibid.*

AWARD of industrial commission. See WORKMEN'S COMPENSATION.

BAILMENT.

Failure of bailee to return goods: Good faith.

1. The fact that plaintiff was the agent of C. in making a conditional contract to sell an automobile to F. is not available to defendant, with whom plaintiff, after subsequently receiving a bill of sale of the car from C., stored it, as an estoppel against plaintiff claiming title to the car, in a suit for its conversion by delivery to F. *Rowlands v. Electrical C. Co.* 165

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2. The defendant, who knew that plaintiff claimed title to the car, was liable for conversion in delivering it to another claiming title, though acting in good faith. *Ibid.*

BANKS AND BANKING.

See TRIAL, 2.

Payment of savings deposit: Negligence.

1. Where the by-laws of a savings bank provided that the bank should not be liable for payments made by it to any person who should produce the depositor's pass-book and that withdrawals might be made by the depositor personally or by written order, payment on a written order to one producing the pass-book exonerates the bank from liability to a depositor, provided the bank in making such payment was in the exercise of ordinary care. *Ninoff v. Hazel Green State Bank,* 560
2. Whether a savings bank in making payment on a forged order, the pass-book being produced, exercised ordinary care, is, under the evidence, a question for the jury, in view of discrepancies in the signature appearing upon the order of withdrawal and that upon the depositor's signature card, and notwithstanding testimony of experienced bankers that in the exercise of ordinary prudence they would have cashed the order. *Ibid.*
3. Although immaterial evidence was admitted that the bank, overlooking the fact that payment had been made on the forged order, telegraphed plaintiff that it would pay no one but him, the jury must be presumed to have considered the evidence as of the date the payment was made, and the admission of evidence as to subsequent communications was not prejudicial error. *Ibid.*

Officers: Knowledge imputed to bank.

4. The knowledge of the president and cashier of a bank that a note which the bank purchased from its president was of fraudulent inception and character was notice to the bank. *Behnke v. Kroening,* 224

BASTARDS.

Paternity: Informal acknowledgment by father.

1. Evidence that the contestant in administration proceedings was received by the intestate as a son and lived as a member of his family until marriage, and afterwards resided in the same neighborhood, the relationship which would naturally exist between a father and an adult son continuing until the death of the intestate, is *held* to establish that he was intestate's son though never formally adopted or acknowledged as such. *Estate of Ecker,* 432
2. Under sec. 2274, Stats., providing that every illegitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, acknowledge

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himself to be the father of such child, a contract properly witnessed, entered into jointly by intestate and contestant, who claimed to be his only heir at law, with one S., stating that intestate "and son" were purchasers from S., and a certain order written by intestate directing a saloonkeeper to "give my son," naming contestant, a keg of beer, constituted sufficient acknowledgment by the intestate that he was the father of contestant. *Ibid.*

BATTERY. See ASSAULT AND BATTERY.

BEQUESTS. See WILLS.

BILL OF EXCEPTIONS. See APPEAL, 11, 14.

BILL OF SALE. See SALES, 1.

BILLS AND NOTES. See GUARANTY.

BROKERS.

See FACTORS. PRINCIPAL AND AGENT, 1-9.

Volunteers: Promise to pay for services already rendered: Consideration.

1. A broker is not entitled to a commission if he acts as a mere volunteer, though his services are the efficient cause of bringing the parties together, but he must have been employed to negotiate the contract therefor. *Dilweg v. Milwaukee M. T. Co.* 200
2. Where plaintiff volunteered to defendant information that a third person desired to place an order for motorcycle engines, a promise by defendant, who obtained the order, to compensate plaintiff will not support a recovery, the promise not being based on any consideration, and the only services on which he relied having already been performed. *Ibid.*

Sufficiency of written contract: Statutory requirements.

3. A brokerage contract containing a certain house number at the beginning of the contract and also on the back, authorizing the broker to sell the buildings "on this lot," is a sufficient description under sec. 2305*m*, Stats., requiring such a contract to describe the real estate to be sold, in view of parol testimony that the words "this lot" were intended to refer to the address at the beginning of the contract. *Graham v. Lamp*, 373
4. Parol or extrinsic evidence is admissible to identify land to be sold under a brokerage contract. *Ibid.*
5. A brokerage contract which was to remain in force until a specified date, and thereafter until terminated by the owner giving to the broker thirty days' notice in writing, is not void for indefiniteness as to duration, in violation of sec. 2305*m*, Stats. *Ibid.*
6. Where the daughter of the owner signed his name to the brokerage contract in the presence of the owner and at his direction, the signature was binding on such owner. *Ibid.*

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Mutuality.

7. A contract by which the owner of real property agrees to give a broker the exclusive right of sale and to pay a commission, "in consideration of your agreement to list and your efforts to find a purchaser," is not void for lack of mutuality, there being a promise for a promise; and even if such promise were not expressed the contract will not be held void for want of mutuality or for lack of consideration after the broker has made a *bona fide* effort to sell the land. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

By-laws: Surrender of loan.

Where the by-laws of a building and loan association provided that in case of the withdrawal of a member he would be entitled to only fifty per cent. of the profits made during membership, a member who surrendered his original loan, took out a new one, and at such time accepted a check for the balance due him after being credited with one half of the profits, cannot thereafter recover from the association the entire profits on the old loan. *Ambroz v. La Crosse Mut. L. & B. Asso.* 583

BURDEN OF PROOF. See TRIAL, 1. WITNESSES, 4.

BY-LAWS.

Of building and loan association. See BUILDING AND LOAN ASSOCIATIONS.
Of corporation. See CORPORATIONS.
Of savings deposit banks. See BANKS.

CANCELLATION OF INSTRUMENTS.

See ESCROWS, 3. MORTGAGES, 2.

Discretion of court.

An application for the cancellation or rescission of a contract is addressed to the sound discretion of a court of equity. *Weinhagen v. Hayes,* 233

Cancellation of tax certificate. See TAXATION, 17.

CERTIORARI. See SCHOOLS, 6, 7.

CHANGE OF VENUE. See VENUE.

CHILDREN. See INFANTS.

CIRCUIT COURT. See APPEAL.

CITIES. See MUNICIPAL CORPORATIONS.

CITY ATTORNEY. See MUNICIPAL CORPORATIONS, 2, 3.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 16. STATUTES, 2.

CLASS LEGISLATION. See CONSTITUTIONAL LAW, 4-6.

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COMPROMISE AND SETTLEMENT.

Consideration: Validity of claim.

In order that the settlement of a claim constitute a valid consideration for a compromise or a promise, the claim need not be one which could be successful if prosecuted, but it must not be made in bad faith or be frivolous or vexatious. *Elmergreen v. Kern,* 622

COMPULSORY SCHOOL ATTENDANCE. See INFANTS, 1-3.

CONDEMNATION. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 13, 20.

CONDITIONAL SALES. See SALES.

CONSIDERATION. See COMPROMISE. GIFTS. TRUSTS, 2. VENDOR AND PURCHASER, 5.

CONSOLIDATION of school districts. See SCHOOLS, 1-4.

CONSTITUTIONAL LAW.

See TAXATION, 7-9.

Presumption of validity of legislative enactment.

1. Where it is claimed that the legislature has not the power to enact certain legislation, it must be by virtue of some constitutional provision, and the burden of pointing out the provision rests upon the person denying the existence of the power. *State ex rel. Binner v. Buer,* 120
2. The question whether a law should be held void because of its repugnance to the constitution is one of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. *State ex rel. Dulaney v. Nygaard,* 597

Equality before the law: Reasonable classification: Discrimination.

3. The provisions of both the federal and state constitutions guaranteeing equal protection of the laws were intended to safeguard the fundamental right of equality before the law and to prevent the enactment of a law which makes unjust discrimination by depriving one person of a right in dealing with his property which it grants another of the same class under like circumstances. *State ex rel. Milwaukee S. & I. Co. v. Railroad Comm.* 458
4. Though the guaranty of equal protection of the laws does not prevent the legislature from making classification of persons, occupations, or industries for special regulation if there are reasonable and proper economic, political, or social reasons for so doing, it does not justify denying to one class rights and privileges that are granted to another under the same conditions and circumstances. *Ibid.*

Same: Emergency housing legislation.

5. Ch. 16, Laws 1920 (Special Session), enacted to meet the housing emergency resulting from the war, but which was to apply only to counties having a population of 250,000 or more,

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denies equal protection of the laws to landlords in those counties, since such emergency existed also in other counties; and the mere fact that more people were affected thereby in a large county does not furnish reasonable ground for separate legislation for such counties. *State ex rel. Milwaukee S. & I. Co. v. Railroad Comm.* 458

Same: Nonpartisan primary elections in certain counties. See ELECTIONS.

6. Sub. (8), sec. 5.26, Stats., providing for the holding of a primary election in counties with a specified population two weeks prior to the regular election, where more than a specified number of candidates are nominated for certain offices filled by nonpartisan nomination and election, does not violate sec. 1, amendm. XIV, Const. U. S., nor sec. 1, art. I. Const. Wis., declaring that all men are born equally free and independent and have certain inherent rights. *State ex rel. Binner v. Buer,* 120

Uniformity of county government. See ELECTIONS.

7. Sec. 23, art. IV, Const., providing that the legislature shall establish but one system of county government, which shall be as nearly uniform as practicable, has no application to the election of judicial officers, they not being county officers. *State ex rel. Binner v. Buer,* 120

8. Said sec. 23 has no application to the election of supervisors in Milwaukee county, in view of ch. 398, Laws 1907 (held a valid enactment in *State ex rel. Scanlan v. Archibold,* 146 Wis. 363), providing for the election of a supervisor from each Assembly district in counties with a population of 250,000, as supervisors in Milwaukee county cannot be elected, under sec. 59.03, Stats., in the same manner as in other parts of the state. *Ibid.*

9. Sec. 1131*a*, Stats,, dispensing with publication, in counties containing a city of the first class, of a statement of the lands on which taxes are delinquent, required by sec. 1130 generally, is special legislation, violative of sec. 23, art. IV, Const., requiring the establishment of but one system of town and county government, which shall be as nearly uniform as practicable, and of sec. 31 of art. IV, prohibiting the enactment of any special law for assessment or collection of taxes, the classification having no logical basis. *Pedro v. Grootemaat,* 412

Reserved power of state over corporations: Franchises. See MUNICIPAL CORPORATIONS, 17-20.

10. The power reserved to the state in sec. 1, art. XI, of its constitution to alter or repeal all general or special acts at any time after their passage, extends and applies to the franchise to *be* a corporation as well as to the franchise *of* a corporation, and the right under such reserved power "to withdraw a franchise must authorize a withdrawal of every and any right or privilege which is a part of such franchise." *Superior W., L. & P. Co. v. Superior,* 257

Immunity from self-incrimination. See WITNESSES, 3-7.

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Validity of inheritance tax legislation. See TAXATION, 3.
Limitation of municipal indebtedness. See MUNICIPAL CORPORATIONS, 11, 12.
Title of legislative enactment. See STATUTES, 2.
State superintendent of schools. See SCHOOLS, 5.

CONTEMPT.

Appeal from order adjudging contempt.

1. An order adjudging one guilty of contempt is appealable, under sec. 3069, Stats. It is not an order, under sec. 3043, from which a writ of error lies, and hence its validity should be tested by appeal. *State ex rel. Jackson v. Reid,* 536
2. Ch. 16, Laws 1920 (Special Session), known as the Rent Law, having been declared unconstitutional by this court (*State ex rel. Milwaukee Sales & Inv. Co. v. Railroad Comm., ante,* p. 458), all proceedings under it are void, and the circuit court should reverse its order adjudging defendant guilty of contempt for refusal to answer questions in a proceeding thereunder. *Ibid.*

CONTRACTS.

See BROKERS. COMPROMISE. COVENANTS. ESCROWS. FRAUDS, STATUTE OF. GUARANTY. MARRIAGE, 3. MUNICIPAL CORPORATIONS, 6-10, 16.

Consideration. See COMPROMISE. GIFTS. TRUSTS, 2. VENDOR AND PURCHASER, 5.

Validity. See COVENANTS. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES. INSURANCE, 3-5. MARRIAGE, 3. MUNICIPAL CORPORATIONS, 6-10. PRINCIPAL AND AGENT, 10, 11.

Construction: Interpretation. See BROKERS. ESCROWS. FRAUDS, STATUTE OF, 1. INSURANCE, 6-8. LANDLORD AND TENANT, 1, 2. PARTNERSHIP, 2. VENDOR AND PURCHASER.

The "interpretation" of a contract consists in ascertaining the meaning of the words used, the purpose being to give effect to the actual contract entered into by the parties. *Adney v. Kraus,* 610

Mutuality. See BROKERS, 7.

Duration. See BROKERS, 5.

Implied contracts. See FACTORS, 4.

Repudiation. See FRAUDS, STATUTE OF, 2.

Annulment. See PRINCIPAL AND AGENT, 10.

Reformation. See REFORMATION OF INSTRUMENTS.

Substitution of debtors. See NOVATION.

Fraudulent contracts. See FRAUDULENT CONVEYANCES.

Particular forms of contracts.

Of brokerage. See BROKERS.
Of guaranty. See GUARANTY.
Of insurance. See INSURANCE.

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Particular forms of contracts—con.
Of partnership. See PARTNERSHIP.
Of sale. See SALES.
With municipalities. See MUNICIPAL CORPORATIONS, 6-10, 16.
CONTRIBUTION. See AUTOMOBILES, 12.
CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES. ELECTRICITY. FACTORS, 1. MASTER AND SERVANT, 9-14. MUNICIPAL CORPORATIONS, 24. WORKMEN'S COMPENSATION, 2.

CONVERSION.

See BAILMENT. TRIAL, 2. VENDOR AND PURCHASER, 2-4.
Measure of damages.
The market value of shares of corporate stock at the time they were converted by the defendant is the measure of plaintiff's damages. *Sloan v. Brown County State Bank,* 36

CORPORATIONS.

See CONVERSION. FRAUD, 1-4. INSURANCE.
Officers: How elected: By-laws.
Under sec. 1776, Stats., providing that the directors of stock corporations "shall choose one of their number president and such other officers as the corporate articles and by-laws require," all officers designated by the articles or by-laws are to be elected by the directors, and a provision of the charter or articles of organization of the corporation for their election by the stockholders is in conflict with the statute which governs the election. *State ex rel. Badger Tel. Co. v. Rosenow,* 9
Control by legislature. See CONSTITUTIONAL LAW, 10.
Banking corporations. See BANKS.
Municipal corporations. See MUNICIPAL CORPORATIONS.

COSTS.

See APPEAL, 8.
In equity cases: Discretion of court.
In an equitable action by a lessor to declare a forfeiture of a lease, the trial court is *held* not to have abused its discretion to award costs in whole or in part pursuant to sub. (7), sec. 2918, Stats., it having awarded them to the defendant lessee in a limited amount. *Dougan v. H. J. Grell Co.* 17
COUNTIES. See CONSTITUTIONAL LAW, 4-9. HIGHWAYS, 1, 2.

COURTS.

See ADMIRALTY. APPEAL, 13. PROHIBITION.
Service of process: Foreign corporations: Property within state.
Property in the state, which, by sub. (13), sec. 2637, Stats. 1919, a foreign corporation is required to have in order to make valid service of process on it in an action by a nonresident

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on a cause of action arising without the state, must be of a substantial nature; mere ownership of office supplies used by a soliciting agent in connection with his duties is not enough to give the court jurisdiction of an action begun by service on such agent. *Petition of Inland Steel Co.* 140

Supreme court.. See APPEAL.

County courts. See APPEAL, 13. WILLS.

COVENANTS.

Covenants for benefit of property: Validity.

1. Where the R. hotel was operated in connection with the C. hotel, and on sale of the C. hotel the deed contained a covenant that the R. hotel should not be used as such for fifteen years, such covenant was a condition of the conveyance of the C. hotel and was intended for the benefit of such property; and the vendee, after a repurchase of the C. hotel, could enforce it against the owners of the R. hotel, the restriction being for the benefit of the C. hotel property and appurtenant to it. *Huntley v. Stanchfield,* 565
2. The use of a building which had been formerly a lodging house to accommodate transients with lodging and to serve meals, though a large part of the house was occupied by families and persons as boarders and lodgers of a private lodging and boarding house, constituted use as a "hotel," in violation of an injunction against the owners using the property as a hotel, contrary to their covenant when they purchased the property not to do so. *Ibid.*
3. Such a covenant is not an illegal restraint of trade, as the facts disclose that it was a reasonable one in view of the hotel business in the locality, the situation and objects of the parties, and the circumstances of the transaction. *Ibid.*

CREDIBILITY of witnesses. See WITNESSES, 2.

CRIMINAL LAW.

See INFANTS, 5-7. RECEIVING STOLEN GOODS.

Preliminary examination: Variance.

1. On preliminary examination defendant was charged with having committed adultery on August 24, 1918, and this date was stated in the information. Prior to the commencement of the trial on March 24, 1920, with the consent of the court, an amended information charging the commission of the crime on August 31, 1918, was filed. *Held,* that the defendant was not prejudiced and cannot complain on the theory that he was never given any preliminary hearing as to the act of August 31, 1918, as only a single act was relied on, and the court, under sec. 4703, Stats., could have permitted evidence as to the act of August 31st under the original information. *Hess v. State,* 96

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Proof of venue: Circumstantial evidence. See VENUE.

2. While it is the better practice to prove the venue of an offense by direct evidence, the failure to do so does not bar a lawful conviction where the venue laid can be inferred from circumstances. *Kellar v. State,* 67

3. This court judicially knows that Rhinelander is the county seat of Oneida county and that there is a town of Three Lakes and a postoffice of the same name in that county; and since the evidence shows that an offense was probably committed at the summer resort of one of the defendants situated at Big Lake, which was six miles from Three Lakes postoffice, and official maps show a Big Lake in Oneida county and none in any other county within a radius of ten miles from Three Lakes, it is *held* that the venue was sufficiently established. *Ibid.*

Adultery: Fornication: Improper evidence: Harmless error.

4. On the trial of a man and woman for adultery and fornication, the testimony of the man's wife that when she told him she was ready to come home from a visit he telephoned her to stay a while longer, that she thought the female defendant had enticed him away from her, and that she and her husband had trouble over the matter, was partly privileged as relating to private communications and partly incompetent, but its admission was not prejudicial, where it was admitted that the husband was at the female defendant's resort and he testified to trouble with his wife because he stayed there. *Kellar v. State,* 67

Self-incrimination of witnesses. See WITNESSES, 3-7.

Specific offenses.

Adultery. See CRIMINAL LAW, 1.
Assault. See WITNESSES, 2.
Forgery. See MORTGAGES.
Fornication. See CRIMINAL LAW, 4.
Receiving stolen goods. See RECEIVING STOLEN GOODS.

CUSTOMS. See SALES, 10.

DAMAGES.

See ASSAULT. CONVERSION. FACTORS, 2, 3. PARENT AND CHILD, 2. SALES, 5-7.

Personal injury: Proof of damages.

1. Where physicians who treated plaintiff were not called to testify and there was not sufficient proof that erysipelas from which she suffered some time after her injury was a result thereof, this element of damages should not have been considered by the jury. *Hahn v. Rothstein,* 381

Same: Excessive damages.

2. In a father's action for the loss of the services of his nineteen-year-old son as a result of personal injuries sustained in an automobile collision, a verdict for $1,000 was *held* excessive. *Schulteis v. Milwaukee C. M. Co.* 358

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DEATH. See ELECTRICITY, 2. MUNICIPAL CORPORATIONS, 24-26. RAILROADS, 1. WITNESSES, 1.

DEBTOR AND CREDITOR. See APPEAL, 11. ASSIGNMENTS. BAILMENT. BROKERS, 7. BUILDING AND LOAN ASSOCIATIONS. COMPROMISE. CONVERSION. DIVORCE, 5-7. EXECUTORS. FACTORS. FRAUD. FRAUDS, STATUTE OF, 3. FRAUDULENT CONVEYANCES. GIFTS. GUARANTY. INSURANCE. JOINT ADVENTURERS, 4, 5. LANDLORD AND TENANT, 5. MORTGAGES. NOVATION. PRINCIPAL AND SURETY. SALES. TRIAL, 2.

DECEIT. See FRAUD.

DECLARATORY RELIEF. See INJUNCTION.

DEDICATION.

Oral acceptance: Improvement of private right of way.

1. Prior to the amendment of sec. 1294, Stats., by ch. 525, Laws 1913, an oral acceptance by a town board of a dedication of a public highway was lawful and binding. *Minocqua v. Neuville,* 347
2. The mere furnishing of funds by a town board for work upon a strip of land could not convert that which was a private easement into a public one, at least as to owners who had not joined in an attempted dedication to the public. *Ibid.*
3. A private right of way could not become a public highway by dedication by the owners of but part of the strip used as such right of way. *Ibid.*

DEEDS. See COVENANTS.

DEFECTIVE HIGHWAYS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 24-29.

DEFINITIONS. See WORDS AND PHRASES.

DELINQUENT CHILDREN. See INFANTS, 5-7.

DEPOSITARIES. See ESCROWS.

DEPUTY SHERIFFS. See SHERIFFS, 1, 3.

DESCENT AND DISTRIBUTION. See BASTARDS. TRUSTS, 2.

DIRECTORS. See CORPORATIONS.

DISCOVERY. See ADVERSE EXAMINATION.

DISCRETION of court. See ACTION. CANCELLATION. COSTS. NEW TRIAL.

DIVISION OF ESTATE. See DIVORCE, 3, 8-10.

DIVORCE.

See APPEAL, 5.

Grounds: Cruel and inhuman treatment.

1. In a divorce action brought by the husband, evidence that the defendant wife had previously brought several divorce actions against him charging failure to support and desertion, and also illicit relations with another woman, which suits were

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dismissed, is *held* insufficient to establish a substantial foundation for the husband's claim that there was cruel and inhuman treatment of him by the wife. *Mahonna v. Mahonna,* 586

Custody of minor child: Division of estate.

2. Where the court granted a divorce to the wife, and the evidence was conflicting on the subject of the fitness of the respective parents to rear their four-year-old son, but there was no claim that the mother was not a suitable and proper person, a judgment awarding custody of the son to the mother until he became old enough to live with the father will not be disturbed on appeal. *Gallagher v. Gallagher,* 32

3. Where it appeared that plaintiff was a widow with two children when she married defendant and that during their married life defendant had turned over his wages, except a small part, to his wife to be applied for family use, and that his property, valued at about $7,000, was practically all accumulated without plaintiff's assistance, an award to plaintiff of $2,601, with monthly payments for the support of the child, is excessive and will be reduced to the sum of $1,500. *Ibid.*

4. On defendant's appeal from the award of the custody of the child to his wife and from the order dividing the property, but not from the judgment granting her a divorce, the judgment of divorce must stand. *Ibid.*

Alimony: Nature: Control by court: Revision.

5. As a judgment for alimony is a continuing judgment, always subject to modification by the court during the life of the parties, the statute of limitations (sub. (1), sec. 4220) does not apply. *Ashby v. Ashby,* 549

6. Where a divorce judgment awarded the wife $10 a month as alimony, but the husband, after paying the alimony for a few years, made no further payments for forty-four years in reliance on the advice of his attorney, the rights of the wife were not lost by reason of her passivity and inaction during that time; but, the husband having become old and infirm and incapable of earning a livelihood by his own personal efforts and having accumulated only a small amount of property, the judgment should be so modified, in view of the changed and altered circumstances, as to award to the wife a reasonable amount in lieu of past-due alimony. *Ibid.*

7. Under sec. 2367, Stats., providing that when alimony shall be adjudged to the wife the court may provide for payment at such times as shall be deemed expedient and impose it as a charge upon any specific real estate of the party liable, the court may impose a charge or lien for past-due alimony on the husband's real estate, whether it be a homestead or not. *Ibid.*

Decree: Construction: Division of estate.

8. A final decree in a divorce action dividing the property between the husband and wife cannot be modified after the term at which it was rendered; the right of a wife to alimony ceases

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upon the death of the husband; and a judgment for support money terminates when the children become of age. *Kuether v. State,* 538

9. Where the original decree awarded property to the wife in trust for herself and children and she thereafter secured a modification which awarded the property to her in terms absolutely, and the state, claiming the property by way of escheat, the husband having died, challenged such modification, the supreme court may, for the purpose of terminating the litigation, construe the original decree, though the modification was void. *Ibid.*

10. Where the statutes relating to divorce in 1869, the time the decree was entered, authorized the court to make a final division of property, but did not authorize a decree that property given to the wife should be held in trust either for her benefit or for that of her children, a decree declaring that real estate of the husband assigned to the plaintiff wife was in trust for herself and the minor children of the marriage must be deemed to vest the absolute title in the wife, the words "in trust," as used in the decree, not creating a trust, but expressing the idea that title to the real estate was vested in the wife to enable her to support the children. *Ibid.*

EASEMENTS.

See DEDICATION, 2, 3.

Oral license to drain surface water: Termination.

1. An oral license to drain surface water across the land of another does not create an easement, even though a valuable consideration is paid for it; and so long as the drainage was by permission of the landowner it could not ripen into an adverse use. *Schmoldt v. Loper,* 152

2. An oral license to drain surface water across the land of another is not assignable, is revocable at will, and terminates if either party dies or the licensor deeds his land to another. *Ibid.*

ELECTIONS.

See CONSTITUTIONAL LAW. INJUNCTION.

Control of exercise of franchise: General or special legislation.

1. A voter is entitled to the same right of suffrage in the election of a public officer that is accorded to all other electors of the territory from or for which such officer is elected, and he cannot be hampered or trammeled in the exercise of such right except as every other voter in such territory is likewise restricted. *State ex rel. Binner v. Buer,* 120

2. Sub. (8), sec. 5.26, Stats., providing for a primary election two weeks prior to the election of members of the board of school directors in any city of the first class when eleven or more candidates have been proposed, is not invalid as special legislation, a law applicable to a single class of cities being a general law. *Ibid.*

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3. Sec. 6.24 and sub. (8), sec. 5.26, Stats., providing for the nonpartisan nomination and election of judicial and school officers and members of county boards in counties with a population exceeding 250,000, is not invalid though the constitution impliedly preserves to the elector the right to express his views on governmental questions through the medium of political parties. *Ibid.*

ELECTRICITY.

See NEGLIGENCE, 2.

Transmission lines: Degree of care required: Boy playing on poles.

1. In dealing with so dangerous and mysterious an agency as electric wires, a public utility maintaining a high-tension transmission line must use a high degree of care to avoid injury to persons who are lawfully liable to come in contact with the wires. *Bonniwell v. Milwaukee L., H. & T. Co.* 1
2. In an action for the death of a boy who climbed a tower carrying electric wires and was killed by a wire strung on poles near the tower, testimony of one of defendant's employees that he did not know of any other place on the line where a wire approached within fifteen inches of the tower at a point within thirty-five feet from the ground was not equivalent to a statement that the arrangement of the wires departed from the usual mode of construction. *Ibid.*
3. A company maintaining high-tension electric lines was not bound to anticipate that a boy would climb one of its towers to a height of thirty feet, circle around it on the narrow crossbars and take hold of a wire near the tower in reliance on the fact that it was "padded," though it knew boys played in the field where the towers were, where it was shown that its employees had never seen boys on the towers and no other child had ever attempted to perform such dangerous feat. *Ibid.*
4. A boy climbing one of the towers to a height of thirty feet and circling it on the crossbars was a trespasser, and the company owed him no active duty of protection, whether or not he was a licensee while playing at the foot of the tower. *Ibid.*

EMANCIPATION. See PARENT AND CHILD.

EMERGENCY HOUSING LEGISLATION. See CONSTITUTIONAL LAW, 5, 6.

EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS, 13, 15.

Property without the state.

The state cannot condemn property beyond its borders and over which it exercises no jurisdiction whatever. *Superior W., L. & P. Co. v. Superior,* 257

EMPLOYERS' LIABILITY. See WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAW. See CONSTITUTIONAL LAW, 3-6.

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EQUITY. See CANCELLATION. COSTS. FRAUDS, STATUTE OF, 3. INJUNCTION. JOINT ADVENTURERS, 5. LANDLORD AND TENANT, 5. LIMITATION OF ACTIONS. MORTGAGES. PRINCIPAL AND AGENT, 4-9. PRINCIPAL AND SURETY. REFORMATION. SALES, 3.

ERROR. See APPEAL AND ERROR.

ESCROWS.

Agreements resting partly in parol.

1. Instruments in writing containing the whole contract of sale or exchange of real property are proper subjects of escrow; but written instruments which do not contain the whole contract so as to comply with the statute of frauds are not proper subjects of escrow and can be recalled by either party, though left with a third party for delivery upon conditions. *Jozefowicz v. Leickem,* 475
2. To constitute a true escrow a contract of sale must be fully executed and nothing left but the transfer of title when the terms of the escrow, all of which must be expressed in the written agreement and not rest in parol, are complied with. *Ibid.*
3. Plaintiff and defendant executed deeds to each other, reciting a consideration of one dollar and the exchange of real estate, and an agreement by each grantee to assume payment of a mortgage on the property received by each respectively. The deeds were deposited with an attorney with verbal directions to deliver the same to the grantees when each presented a receipt showing payment of the back interest on the mortgage on the land conveyed by him. Before defendant tendered his receipt plaintiff demanded from the depositary the return of his deed, which demand was refused and the deed delivered to defendant. *Held,* that there was no valid delivery of the deed, since a material part of the contract rested in parol, and plaintiff was entitled to a cancellation of the deed executed by him and which the defendant had recorded. *Ibid.*

ESTATES OF DECEASED PERSONS. See WILLS.

ESTOPPEL. See BAILMENT, 1. FRAUDULENT CONVEYANCES, 2. NEGLIGENCE, 4, 5.

EVIDENCE.

See ADVERSE EXAMINATION. GIFTS. WITNESSES.

Judicial notice: Population of town: Proof. See CRIMINAL LAW, 3.

1. While the court may take judicial notice of the federal census, the population of a town, under sec. 1240, Stats., providing that no town containing less than 500 inhabitants shall collect a highway tax of more than $2,000, is not determined by the preceding federal census, but by the number of inhabitants when the tax is sought to be levied, and is a fact to be proved in the same manner as any other fact; and a taxpayer who

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claimed that the highway tax of a town was invalid because the population of the town was less than 500 had the burden of proving that fact. *Grimm v. Bayfield County,* 43

Admissions. See PLEADING. RAILROADS, 4.

Opinion evidence: Weight. See PHYSICIANS.

2. While the testimony of expert witnesses is entitled to full, fair consideration by the jury, it is, excepting in a very limited class of cases, not bound thereby. *Ninoff v. Hazel Green State Bank,* 560

Parol evidence: Records of town meeting. See BROKERS, 3, 4. DEDICATION. ESCROWS.

3. Where the records of a town meeting, kept by the town clerk under sec. 60.16, Stats., showed that a motion was made and seconded, without showing what became of the motion, parol evidence was admissible to show that the motion was carried. *Grimm v. Bayfield County,* 43

4. Where such records stated that the annual meeting was held April 5th, though the meeting was required by law to have been held on April 3d, parol evidence was admissible to show that the meeting in fact was held on April 3d, since the notation in the record that the "annual meeting" was held April 5th contained inconsistent statements, making the record on its face worthless as evidence. *Ibid.*

Res gestæ: Declarations after event.

5. Declarations of the driver of a truck which had struck a bicycle rider, made at the police station to which he had accompanied a policeman from the scene of the injury, are not admissible as part of the *res gestæ;* and testimony as to such declarations was inadmissible without a proper foundation being laid by first interrogating the witness. *Thomas v. Lockwood Oil Co.* 486

Weight and sufficiency. See BASTARDS. CRIMINAL LAW, 2. DAMAGES, 2. DIVORCE, 1, 3. FACTORS, 2. FRAUD, 1, 3. GUARANTY, 5. MARRIAGE, 1. MASTER AND SERVANT, 15. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 29. PRINCIPAL AND AGENT, 5. RAILROADS, 3, 4. SALES, 8. SCHOOLS, 1. TRIAL, 6, 7. VENDOR AND PURCHASER, 3, 4.

Relevancy, materiality, and competency. See ADVERSE EXAMINATION, 1. APPEAL, 22. BANKS, 3. BROKERS, 4. CRIMINAL LAW, 3, 4. DAMAGES, 1. FRAUD, 2, 3. PHYSICIANS. RECEIVING STOLEN GOODS, 2. VENDOR AND PURCHASER, 2. WITNESSES.

Cumulative testimony. See FRAUD, 3.

Circumstantial evidence. See RECEIVING STOLEN GOODS, 2.

EXCEPTIONS. See APPEAL, 11-15.

EXCESSIVE DAMAGES. See DAMAGES.

EXCHANGE OF PROPERTY. See ESCROWS, 3. FRAUD, 5.

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EXECUTORS AND ADMINISTRATORS.

See BASTARDS. GIFTS. TRUSTS, 2.

Fees: Basis of computation: Attorney fees.

1. Fees of an executor under sec. 3929, Stats., should be computed on the value of the estate as determined by the appraisers, unless set aside for cause, where the property is distributed in kind, and, where there is a sale of the property, on the amount received on the sale. *Will of Matthews,* 220
2. The fact that an estate was valued in excess of $250,000 does not warrant the allowance of excessive fees to the attorneys for the executor, but is a factor to be taken into consideration in determining the proper amount to be allowed, as to some extent it fixes the responsibility resting on the attorneys. *Ibid.*

FACTORS.

See BROKERS. PRINCIPAL AND AGENT, 2.

Failure to sell on principal's order: Damages: Intent.

1. In an action for breach of an agreement to sell plaintiffs' barley as instructed by them, contributory negligence was not an issue, since, if plaintiffs directed the defendant to sell, it became its duty to exercise reasonable diligence to execute the direction, while if no directions were given defendant was relieved of liability, not because of contributory negligence but because no duty was placed upon it to act. *Jacobi v. Rubicon M. & G. Co.* 344
2. Where it appeared that the barley could have been sold, after directions were given by plaintiffs, by May 8th, but there was no evidence as to the market price on that date and there was a sharply fluctuating market, evidence of the market price on May 2d and May 15th would not support a finding for plaintiffs. *Ibid.*
3. Where all other issues were determined on competent evidence, but there was no sufficient evidence as to market value, the cause will be remanded with directions to take evidence on that issue, unless the parties stipulate as to the value, and to enter judgment accordingly. *Ibid.*
4. The defendant having agreed to sell plaintiffs' barley, the law implied a promise to pay plaintiffs when it received returns on the sale, and interest was recoverable from such time without demand. *Ibid.*

FALSE REPRESENTATIONS. See FRAUD.

FEDERAL EMPLOYERS' LIABILITY. See MASTER AND SERVANT, 10, 11. RAILROADS, 4.

FEES.
Of executors. See EXECUTORS.
Of sheriffs. See SHERIFFS.

FIDUCIARY RELATIONS. See GIFTS. JOINT ADVENTURERS.

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FINDINGS OF FACT. See TRIAL, 4.

FIRE INSURANCE. See INSURANCE.

FIXTURES. See LANDLORD AND TENANT, 3, 4.

FOREIGN CORPORATIONS. See COURTS.

FORFEITURE.
Of charter. See WITNESSES, 3.
Of franchise. See MUNICIPAL CORPORATIONS, 18.
Of lease. See COSTS. LANDLORD AND TENANT, 4.

FORGERY. See MORTGAGES, 1.

FORNICATION. See CRIMINAL LAW, 4.

FRANCHISES. See CONSTITUTIONAL LAW, 10. MUNICIPAL CORPORATIONS, 17-22.

FRATERNAL BENEFIT SOCIETIES. See INSURANCE.

FRAUD.

See GUARANTY. INSURANCE, 7. LANDLORD AND TENANT, 5. MARRIAGE. MORTGAGES, 2. PRINCIPAL AND AGENT, 3-5, 10, 11. PRINCIPAL AND SURETY.

Fraudulent representations: Evidence: Declarations to third persons.

1. In an action by a corporation on a note given upon subscribing for capital stock of the corporation, where the maker testified to fraudulent representations by the agent of the corporation, which were denied by the agent, the jury's finding against the fraud cannot be said to be against the overwhelming weight of the evidence. *Industrial Co-operative Union v. Lewis,* 466
2. Where the defense to the action was that the subscription was induced by fraudulent representations, evidence that the agent of the corporation had made similar representations to other subscribers to procure notes from them is immaterial on the question whether such representations were made, and for that reason is incompetent as impeaching testimony. . *Ibid.*
3. Where numerous actions were begun on notes given by subscribers for corporate stock, in each of which the defense was fraudulent representations, a stipulation that one case should be tried and its decision should determine all the others, and that at the trial of such case each defendant should be permitted to testify as to his dealings with the plaintiff, did not make the testimony of the different defendants as to representations made to them by the agent of the corporation cumulative testimony which could be considered in determining whether he made the representations charged to the defendant whose case was on trial. *Ibid.*

Same: Nature of actionable representation.

4. Representations, to be fraudulent, must relate to a present or past state of facts. *Industrial Co-operative Union v. Lewis,* 466

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5. A representation by one making an exchange of lands that he had been offered $7,000 for his property, if false, constituted a fraud warranting rescission. *Becker v. Spalinger,* 443

FRAUDS, STATUTE OF.

See ESCROWS.

Substantial performance: Supplementary agreements.

1. Where a written contract for the sale of a farm and personal property contained all the essential terms required in law, except that the time of payment of the purchase price and the rate of interest were not specifically embodied, and a subsequent definite oral agreement as to such matters was made which was in no way contradictory of but supplementary to the written agreement, which indicated on its face that it did not contain the entire transaction of the parties respecting the subject of the contract, it is no legal objection that the contract was in part in parol. *Hopfensperger v. Bruehl,* 426

2. Under such circumstances there was a substantial part performance of the contract, where the seller let plaintiff into possession of the entire farm except the house, and of all the personal property, plaintiff's son boarding with defendant and taking care of the stock and working on the farm, and everything appearing to be harmonious until the seller concluded to repudiate the contract. *Ibid.*

Circumstances taking case out of statute.

3. Where one on the strength of a defective agreement in good faith parts with a valuable consideration which enriches the promisor, a court of equity will enforce the agreement, though it requires the lifting of it out of the statute of frauds. *Peavey v. Loveland,* 57

Oral license to drain land. See EASEMENTS.

FRAUDULENT CONVEYANCES.

Enforcement: Want of consideration: Estoppel.

1. Conveyances of property made in fraud of creditors, while void as to creditors, are valid between the parties; but want of consideration may be set up as a defense in an action to foreclose a mortgage executed to defraud creditors. *Behnke v. Kroening,* 224

2. One who executed a mortgage and note to defraud creditors was not estopped to set up lack of consideration for the note as a defense in an action by a transferee of the note and mortgage who had participated in the original transaction. *Ibid.*

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GIFTS.

See TAXATION, 4. TRUSTS, 2, 3.

Transaction with one standing in fiduciary capacity: Presumption.

Where an aged widow mortgaged her own property and gave the funds thereby secured to the defendant, her son-in-law, who purchased therewith incumbrances on property belonging to the estate of her husband and certain unsecured notes signed by the husband, and thereafter, in the course of the administration of the husband's estate, the widow, as administratrix, conveyed the real estate owned by her husband in his lifetime to the defendant, who in fact paid no consideration therefor, the defendant is bound in subsequent proceedings by the widow's heirs, where he claimed that the transaction was a gift, to show that there was no abuse of the trust and confidence reposed in him, and in the absence of such evidence it will be presumed that there was no valid gift. *Beilfuss v. Dinnauer,* 507

GOOD FAITH. See BAILMENT, 2. BROKERS, 7. COMPROMISE. JOINT ADVENTURERS.

GUARANTY.

See ASSIGNMENTS, 2.

Release of guarantor.

1. Sec. 1679—1, Stats., specifying the conditions under which a person secondarily liable on a negotiable instrument may be discharged, does not specify all the instances or contingencies that may arise to release a guarantor; but action on the part of a creditor after a note is due which amounts to a fraud on the guarantor, misleading him and depriving him of an opportunity of recoupment and protection, may discharge the guarantor. *Farmers State Bank v. Hansen,* 100
2. Conduct such as will release a guarantor cannot arise from mere passivity on the part of a creditor, but must consist of some affirmative act or connivance or gross negligence amounting to a fraud. *Ibid.*
3. The payee of a note is not required to notify the guarantor of the maker's nonpayment. *Ibid.*
4. A guarantor who expressly waived notice of nonpayment of a note was not discharged by the failure of the payee to notify him of nonpayment, regardless of the reasons which prompted the payee not to give such notice. *Ibid.*
5. If the cashier of a bank, which was the payee of a note, and the maker agreed that the fact of nonpayment should be misrepresented to the guarantor, and pursuant to such agreement the maker informed the guarantor that the note was paid, and the guarantor thereby lost an opportunity of recoupment, he would be released from liability; but it is *held* that the evidence does not support such a finding. *Ibid.*

HEIRSHIP. See BASTARDS.

HIGH-TENSION TRANSMISSION LINES. See ELECTRICITY.

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HIGHWAYS.

See AUTOMOBILES. DEDICATION. MUNICIPAL CORPORATIONS, 24-29. TRIAL, 3.

Defective condition: Notice to municipality: Danger signs.

1. Where as part of the permanent construction of a state trunk highway a culvert and grading were ordered by the county authorities and the work was performed under the supervision of the state authorities and left in an unsafe condition, the county had notice of a defect due to the making of such repairs so as to be liable for an injury under sub. 5, sec. 1317, Stats. *Brubaker v. Iowa County,* 574
2. The posting of signs on a road which was being repaired stating that it was closed for travel was not sufficient to relieve the county from liability, where there were no barriers and the signs were not such as would have warned an ordinarily prudent traveler, and to the knowledge of the county authorities the road was being used by the public. *Ibid.*

Law of the road: Pedestrians: Lookout for oncoming vehicles.

3. In an action for personal injuries by a pedestrian struck by a team overtaking her on the road, wherein it appeared that after she became aware of its approach at a distance of 600 feet she thought she could hear it in time to step aside, but looked back twice before she was struck, as she contended, without hearing it, the court properly ruled that the law did not require her to keep a further lookout under the circumstances. *Seitz v. Ott,* 60

HOMESTEAD. See DIVORCE, 7.

HOTELS. See COVENANTS.

HUSBAND AND WIFE. See AUTOMOBILES, 8-12. DIVORCE. MARRIAGE. MASTER AND SERVANT, 15, 16.

HYPOTHETICAL QUESTIONS. See PHYSICIANS.

IMPUTED NEGLIGENCE. See AUTOMOBILES, 8, 9.

INCOME TAX. See TAXATION, 7-11.

INCORRIGIBLE CHILDREN. See INFANTS.

INDETERMINATE PERMIT. See MUNICIPAL CORPORATIONS, 20.

INDUSTRIAL COMMISSION. See SCHOOLS, 8. WORKMEN'S COMPENSATION.

INFANTS.

See ELECTRICITY, 2-4. MASTER AND SERVANT, 17. NEGLIGENCE, 2. PARENT AND CHILD. SCHOOLS, 9. WORKMEN'S COMPENSATION, 3.

Incorrigibility: Failure to attend school.

1. The provision of sec. 40.73, Stats., relative to compulsory school attendance, that any person proceeded against thereunder may prove in defense his inability to compel a child under his control to attend school and shall thereupon be

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discharged and that the child shall be proceeded against as incorrigible, contemplates that the parent shall first be proceeded against if a child within his care and custody does not comply with the law relating to compulsory school attendance. *In re Alley,* 85

2. A boy twelve years old who during the school year was absent fifty-seven and one-half days, usually on Friday, with his father's consent, for the purpose of working to earn money with which to buy clothes, was not "habitually truant" within the meaning of sec. 48.01, relative to delinquent children. *Ibid.*

3. "Habitual truancy" amounting to delinquency under sec. 48.01 is a refusal to attend school in defiance of parental authority; and a child can only be held a truant when the parent is unable to compel compliance by the child with the provisions of the compulsory school attendance law. *Ibid.*

Same: Committing child to industrial school.

4. A child should not be deprived of a home or a parent of the right to the child's custody and care under the juvenile laws except in cases where the best interests of the child clearly warrant such step; and any doubt should be resolved in favor of the home though it be imperfect and though its standards be not of the highest. *In re Alley,* 85

5. Secs. 48.01 to 48.34, relative to delinquent children, do not provide a method of punishment for crimes committed by juveniles, but of improving the child's condition, and cannot be construed and applied as a punitive statute. *Ibid.*

6. A child cannot be committed to an industrial school as a delinquent child on the ground that his home is not a fit and proper place for him where the father, though earning low wages, has done the best he could and the home is as good as thousands of other homes existing under like circumstances. *Ibid.*

7. Where a boy twelve years old attempted to frighten his schoolmates and their teacher by exploding dynamite caps and fuse, but without expecting or anticipating that another boy would pick up a lighted fuse and be injured thereby, he cannot be committed to the industrial school for boys as a delinquent. *Ibid.*

INFORMATION. See CRIMINAL LAW, 1.

INHERITANCE TAXES. See TAXATION, 1-6.

INJUNCTION.

See COVENANTS, 2.

Restraining election commissioners from enforcing unconstitutional law.

An action to restrain boards of election commissioners from enforcing and following the provisions of alleged unconstitutional statutes in the conduct of an election and future elections presents an existing controversy calling for judicial

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cognizance independent of sec. 2687*m*, Stats., authorizing the maintenance of equitable actions to obtain declaratory relief. *State ex rel. Binner v. Buer,* 120

INSPECTION OF DOCUMENTS. See WITNESSES, 6, 7.

INSTRUCTIONS TO JURY. See AUTOMOBILES, 2. HIGHWAYS, 3. MUNICIPAL CORPORATIONS, 24. NEW TRIAL. PARENT AND CHILD, 2. RECEIVING STOLEN GOODS, 3. TRIAL, 2.

INSURANCE.

See TAXATION, 1-5.

Solicitor as agent of insurer: Fraternal benefit societies.

1. Sec. 1977, Stats., providing, among other things, that whoever solicits insurance on behalf of an insurance company for a commission or other consideration shall be deemed the agent of the company to all intents and purposes, but that this shall not apply to agents of licensed fraternal beneficiary societies, and sub. 1 and 9, sec. 1956, defining fraternal benefit societies and excluding them from the operation of statutes not expressly designating such societies, do not confer authority on an agent of a foreign fraternal benefit society to make an oral contract of present insurance prior to delivery of the written policy. *Valerio v. Woodmen of the World.* 519

2. Knowledge of the agents of an insurance company was knowledge of the insurers, notwithstanding ch. 127, Laws 1917, omitting from the standard form of policy the provision as to knowledge of the agent being that of the company, since the inclusion of such provision was merely declaratory of the law as it existed and added nothing to the effect or value of the policy. *Gould v. Pennsylvania F. Ins. Co.* 422

Validity of contract: Mortgaged goods: Concurrent insurance.

3. A statement by an insured to the state fire marshal investigating a fire that insured and another named person were partners, where the undisputed proof showed that insured was the sole owner of the burned goods, subject to chattel mortgage held by such named person, did not affect the validity of policies insuring the goods. *Gould v. Pennsylvania F. Ins. Co.* 422

4. Where an agent issued a fire insurance policy knowing there was to be concurrent insurance on the property, the policy was not void on the ground that it did not permit concurrent insurance, the issuance of the policy with such knowledge on the part of the agent constituting consent to concurrent insurance by the insurer. *Ibid.*

5. Where agents knew that goods were mortgaged at the time that they consented, on behalf of the insurer, to the assignment of policies insuring the goods, the mortgaging of such goods was no defense in an action on the policy by the assignee. *Ibid.*

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Construction of contract.

6. A fire insurance policy covering "lumber and building material located on property situate on" described land is construed to cover all lumber and building material upon the described premises, whether piled in the open or under cover or in buildings, including that contained in partly completed dwelling houses. *Newport M. Co. v. Firemen's Ins. Co.* 401
7. An answer alleging that it was intended that the policy was to cover only lumber piled in the open, without an allegation of fraud, mutual mistake, or a prayer for reformation of the contract, does not raise an issue as to whether the policy should be reformed because of mutual mistake in its execution. *Ibid.*
8. Where plaintiff was insured under an accident and health policy as a "finisher" in a furniture shop, but was injured while employed in a bakery doing shop service in putting bread in boxes, he could recover on the policy as a "baker," which was within the same class of hazards, since the word "baker," in its ordinary use respecting the bakery business, has a generic meaning and includes in its scope different services connected with such business. *Futopolus v. Midland C. Co.* 208

Notice of injury: Time of giving.

9. In an action on a health and accident insurance policy, where the evidence was uncertain as to whether plaintiff was disabled during the twenty days following the time he quit work on account of an injury, it was for the jury to determine whether notice of the accident was given as soon as reasonably possible in view of the facts and circumstances of the case, and their verdict on the issue must stand. *Futopolus v. Midland C. Co.* 208

INTEREST. See FACTORS, 4.

INTERPLEADER. See AUTOMOBILES, 12.

INTERSTATE COMMERCE. See RAILROADS, 4, 5.

JOINT ADVENTURERS.

Nature of relation: Duty of associates inter se: Fraud.

1. A joint adventure may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; and each has a right to demand and expect from his associates good faith in all that relates to their common interest. *Sander v. Newman,* 321
2. Where two persons, one having an option to buy land on terms of part payment in cash, found a purchaser for the land at an increased price but on terms of annual payments with no cash down, and, being unable to handle the option, joined two other associates, and the four opened a subscription list and others were induced to subscribe, one of the four being made trustee, the relation between all the parties was not a partnership but a joint adventure. *Ibid.*

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3. The four associates, being fiduciaries in relation to all the other subscribers, became responsible to them in damages for fraudulently representing the price for which the lands might be purchased and the profit at which they might be resold, and the subscribers may recover the amount of the secret profits secured and retained by the fiduciaries. *Ibid.*

Limitation of action.

4. A claim for damages because of fraud in collecting and appropriating secret profits was enforceable in a legal action when the wrong was consummated, and the statute of limitations (sec. 4222, Stats. 1911) applies and is a bar to an action to enforce a claim arising out of such a fraud committed over six years before the action was begun. *Sander v. Newman,* 321

5. The fact that one of the defendants acted as trustee in handling the money and property of the syndicate does not make him accountable for the property irrespective of the six-year statute of limitations, as the right of action against him does not spring out of his relation as trustee to the members of the syndicate, but out of his fraudulent conduct; and an action against him is not one of that class of actions relief for which was "on February 28, 1857, cognizable solely by the court of chancery," and hence within the exception of sub. (7), sec. 4222, Stats. *Ibid.*

JOINT ENTERPRISE. See AUTOMOBILES, 8, 9.

JUDGES. See CONSTITUTIONAL LAW, 7.

JUDGMENT. See ASSIGNMENTS, 2. DIVORCE, 8-10.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUVENILE COURTS. See INFANTS, 4.

LAND CONTRACTS. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See PRINCIPAL AND AGENT, 1-9. PRINCIPAL AND SURETY. SHERIFFS, 4.

Construction of contract: Independent leases.

1. A lease of land to be used for the purpose of manufacturing butter, executed in 1894, and a lease five years later of a small piece of land for the purpose of providing a residence for the butter-maker, are independent agreements, and provisions contained in the second lease relating to re-entry could not be construed as though contained in the first. *Dougan v. H. J. Grell Co.* 17

2. A clause in the lease providing that the leased premises were to be used for "the purpose of residence for butter-maker" cannot be construed to contain an implied covenant that there was to be a continued possession of the dwelling house by one who was a butter-maker. *Ibid.*

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Same: Removal of buildings and machinery by tenant.

3. Where buildings were placed on leased premises by the tenant and continuously assessed as personalty and the taxes paid by the tenant, who also kept the buildings insured, the structures erected and the machinery contained in the buildings being suitable for and devoted to business purposes, the tenant, although there be no express stipulation in the lease, had the right to remove all of such fixtures and the machinery contained in them at or before the lawful expiration of his term. *Dougan v. H. J. Grell Co.* 17

4. In an action by the lessor to forfeit the lessee's title and interest, a disclaimer by the lessee, in its notice of a proposed auction sale of the leasehold interest and in its pleadings, expressly reciting that a certain dwelling house on the leased premises was not to be removed by it, is binding on the defendant lessee. *Ibid.*

Fraud: Rescission by lessee: Accounting.

5. Where parties entered into a long-time lease, and the lessees, on discovering that the lessor had made payments to their agents, elected to rescind, they should, in so far as possible, be placed *in statu quo*, and there should be an accounting between them; but the lessor is not chargeable with losses due to the faults or mismanagement of the lessees, and the latter, who must return the property to the lessor, cannot recover any sums paid by him to their agents. *Weinhagen v. Hayes,* 233

Emergency housing legislation. See CONSTITUTIONAL LAW, 5.

LAW OF THE ROAD. See AUTOMOBILES. HIGHWAYS, 3.

LEASE. See LANDLORD AND TENANT.

LEGACIES. See WILLS.

LEGISLATURE. See CONSTITUTIONAL LAW, 1, 7, 10.

LICENSEES. See ELECTRICITY, 4.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS.

See DIVORCE, 5. JOINT ADVENTURERS, 4, 5. NEGLIGENCE, 4, 5. SCHOOLS, 2, 7. WITNESSES, 4.

Available in law or in equity.

The statute of limitations may be invoked against an action in equity as well as against one at law, if the cause of action constitutes a legal liability enforceable as such in law or equity. *Sander v. Newman,* 321

LOAN ASSOCIATIONS. See BUILDING AND LOAN ASSOCIATIONS.

MALPRACTICE. See PHYSICIANS.

MANDAMUS. See APPEAL, 1.

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MARRIAGE.

See APPEAL, 2, 4. DIVORCE.

Annulment: Fraud: Consummation of marriage.

1. In a husband's action to annul his marriage, testimony that the wife, her mother, and her brother told him that he must marry the wife, and that he married because she and her mother were insistent and out of pity for her, is *held* not to support a finding that fraud, force, or coercion had been used to induce the husband to marry, under sub. (4), sec. 2351, Stats., stating grounds for the annulment. *Hempel v. Hempel,* 332
2. The husband, by cohabiting with his wife for six months after marriage, confirmed the marriage even though it had been procured by fraud, coercion, or duress and was precluded from having it annulled under sub. (4), sec. 2351. *Ibid.*
3. The test as to whether a marriage can be annulled because of mental incompetency under sub. (5), sec. 2351, providing for annulment of a marriage entered into with such want of understanding as renders either party incapable of assenting to marriage, is whether the want of understanding rendered the party at the time incapable of assenting or consenting to the making of such a civil contract which marriage is defined to be by sec. 2328. *Ibid.*

MARRIED WOMEN. See TAXATION, 2.

MASTER AND SERVANT.

See NEGLIGENCE, 3. RAILROADS, 1-4. SCHOOLS, 8. WORKMEN'S COMPENSATION.

Who is employee: Servant loaned to special employer.

1. Although an employee, loaned with his own consent to a special employer, becomes the servant of such employer, if an owner hires his team and driver to another to do work to be designated and as directed by the hirer, but the hirer has no authority to discharge the driver and substitute another, the driver remains the servant of the owner in matters relating to the safety and management of the team, and the owner, and not the hirer, is liable to third persons for damages from his negligent management. *Wagner v. Larsen,* 26

Liability of master for servant's acts: Scope of employment.

2. Where a truck driver digressed from the proper side of the road to pick up plaintiff, whom he had invited to ride with him in violation of his duties to his employer, the employer was not liable for the driver's negligence in running into plaintiff. *Seidl v. Knop,* 397
3. An act of a servant or agent cannot be deemed to be within the course of the employment unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated. *Ibid.*

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Same: Deviation from master's service.

4. To relieve a master from liability to third persons arising from his servant's negligence on the ground that the servant had deviated from the service, such deviation must be so substantial as to amount to a departure therefrom and must be for purposes entirely personal to the servant. *Thomas v. Lockwood Oil Co.* 486
5. The route to be traveled by an automobile truck driver, in the absence of express directions from his employer, is discretionary with the driver, and in selecting certain streets, in the exercise of such discretion, he is still within his master's service. *Ibid.*
6. The driver's act in going around a block unnecessarily for the purpose of delaying return to his place of employment to avoid being sent out on another trip is not of itself a departure from the employer's service so as to exonerate the employer from responsibility for the driver's negligence; nor did the driver, while headed in a proper direction toward his master's place of employment, depart from his employment so as to exonerate the employer from responsibility for the death of a bicycle rider struck by the truck simply because its driver had an intention to again drive around the block in the hope of seeing a lady friend. *Ibid.*
7. Where the driver's deviation from his route was slight and not unusual, the court may as a matter of law determine that he was still executing the master's business. *Ibid.*
8. Where the driver was delivering oil and permitted a friend who was with him to drive the truck so that he could ascertain the cause of trouble in the operation of the truck and shift the position of a barrel, the driver's friend, in operating the truck, was an employee of the owner so as to render the latter liable to a third person struck by the truck. *Ibid.*

Assumption of risk: Defective tools.

9. Where work is attended by open and obvious dangers, a servant who undertakes such work appreciating the danger, or continues therein without protest, assumes the risk; but where the risk arises from the use of defective machinery and the employee objects to a continuance of the employment because of the risk arising from such defect and the employer promises to remedy it, the employee may continue in such employment for a reasonable time, relying on the promise to repair, without assuming the risk. *Nickas v. Hines,* 387
10. Where plaintiff, a railroad section hand, claiming damages under the federal employers' liability act for injuries occasioned by a dull pick, protested to his foreman that the tools were not very good and asked for good picks for pulling ties, and the foreman replied that better picks were not to be had until the arrival of the supply car which was not due for twenty-five days, and that until then the crew had to continue work with the defective picks, plaintiff, by continuing in his employment, assumed the risk of the employment. *Ibid.*

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[11. Whether this court or the federal courts have taken any position in reference to the so-called simple-tool doctrine, is not involved or decided in this case.] *Ibid.*

Same: Safe place to work.

12. In an action by a servant for personal injuries it is not a defense that the employee assumed the risk of the employment, where the relation of the parties was such that it was the duty of the defendant, under sec. 2394—48, Stats., to furnish the plaintiff a safe place to work, where plaintiff was not engaged in labor upon defendant's farm but in private domestic service which involved the use of mechanical power within the meaning of sec. 2394—41; but the defense of contributory negligence remains. *Beck v. Siemers,* 437

13. In such case, a finding of the jury that plaintiff was guilty of contributory negligence is not supported by testimony which was only such as showed assumption of risk. *Ibid.*

14. In such case, merely continuing in an employment and doing work as intended by the employer and the employee in the usual and ordinary manner, although the place of work is unsafe, does not constitute contributory negligence. *Ibid.*

15. In an action against husband and wife by plaintiff, who had been hired to do the family washing, for injuries to her hand by being caught in the wringer of an electric washing machine, evidence that a safety device was installed on the machine similar to that on many other types of such machines and that the form of guard suggested by plaintiff's expert witness had been discarded by practically all manufacturers for the one installed, which seemed more adequate for the purpose, did not justify a finding of the jury that the wringer, in the usual and customary manner of using it, was not as free from danger as the nature of the work reasonably permitted. *Hahn v. Rothstein,* 381

16. Where the defendant wife testified, "We bought the machine," and that she supposed she hired the plaintiff on behalf of her husband as well as herself, judgment was properly rendered against both, in the absence of any testimony to the contrary from defendants. *Ibid.*

Same: Employment of minors.

17. Where a permit authorizing the employment of a fourteen-year-old boy has been regularly issued, it is not to be presumed that the officials granting such permit neglected their duty or that they regarded the establishment of the employer or the employment as dangerous to life or limb. *Radtke Bros. & Korsch Co. v. Rutzinski,* 212

MINORS. See INFANTS. PARENT AND CHILD.

MISREPRESENTATIONS. See FRAUD.

MISTAKE. See TAXATION, 15.

MONOPOLIES. See WITNESSES, 3, 6.

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MORTGAGES.

See ASSIGNMENTS, 2.

Forged releases: Presumption: Negligence.

1. The presumption under sec. 4156, Stats., that a recorded release in proper form was duly executed, is not conclusive, but the mortgagee may show that the release is a forgery and void; but proof of such forgery must be clear, convincing, and satisfactory. Where, however, the original document of which the record is a copy is destroyed and thus part of the evidence is lost, the strict rule will be relaxed; and the presumption is likewise weakened where the acknowledging officer acted fraudulently. *Seidl v. Paulu,* 403
2. If plaintiff, seeking cancellation of a mortgage release and foreclosure of the mortgage, signed the satisfaction, which was of record when the land was purchased by the defendants, there was some element of neglect or want of caution on her part, and the instrument was not absolutely void as in the case of forgery; and the rule that, if one of two innocent parties must suffer, the loss must be borne by one whose want of care has enabled the third person to commit the wrong or fraud, applies against plaintiff. *Ibid.*

MOTION. See VENUE, 2.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See DEDICATION. ELECTIONS, 3.

Salaries of officers: How and when fixed.

1. An informal arrangement by members of a city council at its first regular February meeting, at which the council was required by sec. 925—30, Stats., to fix the salaries of city officers, to postpone action on the salary question, did not make the meeting held at the time for the regular March meeting, and which was shown by the records of that meeting to be the regular monthly meeting of the council, an adjournment of the February meeting. *Smith v. Phillips,* 54
2. The requirement of sec. 925—30 as to the time for fixing salaries for the ensuing year and that such salaries "shall not be increased or diminished during his term of office," is mandatory, and the action of the council at its March meeting in fixing the salary of the city attorney is not valid. *Ibid.*
3. Under a provision of said sec. 925—30 that all salaries fixed by the common council shall remain the salaries of said officers until the council shall otherwise determine, the salary of a city attorney, regularly fixed in 1914, remained the salary of the officer elected to that office in 1916, where no change was made by the city council at the meeting in 1916 designated for that purpose by statute, though the salary was reduced at the regular meeting in March, 1916. *Ibid.*

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Levy of taxes for vocational schools.

4. Under sub. (1), (2), sec. 41.16, Stats., the common council of a city was not required to levy a tax of 1.5 mills for the requirements of the vocational school of the city as requested in the report of the local board of industrial education, but was required to levy a tax to raise an amount which, when added to the funds otherwise available for such purposes, would equal the requirements fixed by the board. *State ex rel. Hathaway v. Mirlach,* 11

5. The authority conferred by secs. 41.13 to 41.21, Stats., necessarily implies that the governing boards are vested with the power to determine what amount shall be contributed for the support of the schools by local taxpayers, within the limitation of 1.5 mills prescribed by the legislature. *Ibid.*

Municipal contracts: How let: Contracts in which municipal officers are interested.

6. Requirements in statutes that municipal contracts be let to the lowest bidder are important and are not to be arbitrarily disregarded; but municipal officers have no right to enter into contracts in behalf of the municipality in which they are interested directly or indirectly. *Edward E. Gillen Co. v. Milwaukee,* 362

7. A member of the Milwaukee sewerage commission who at the time a contract was awarded by the commission and for some time prior thereto was in the employ of the successful bidder as a superintendent at a salary of $4,500 a year had such an interest in the business and welfare of such bidder as would tend to affect his judgment in determining on the work involved, in determining to let the work by contract, in framing the contract, in passing on the competency and reliability of bidders, and on questions relating to the performance of the work and the compensation to be paid. *Ibid.*

8. Under sec. 8, ch. 304, Laws 1917, authorizing the Milwaukee sewerage commission to reject bids and to award contracts to the lowest competent and reliable bidder, or relet the contract when a bidder is incompetent or unreliable, the commission was justified in deciding that the lowest bidder was not a competent bidder and in reletting the contract, where one of its members was in the bidder's employment as superintendent, even though such member resigned his position with the bidder and the work was relet at a higher price. *Ibid.*

9. A member of the sewerage commission who never had any financial interest in a company in which his son was interested and of which the son was an officer, and who ten years before had disposed of all his interest in the company's predecessor, was not disqualified to vote on the award of a contract to such company. *Ibid.*

10. Nor was such commissioner disqualified to vote on the award of a contract to a corporation leasing land from a company of which he was a stockholder where it was not shown that the lessee company was insolvent or had not paid its rent

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promptly, or that the land would not rent to others for an equal amount, especially where the other members of the commission knew the facts. *Ibid.*

Acquisition and construction of public utilities: Creation of indebtedness.

11. While sec. 927—16, Stats., authorizes cities to acquire and construct public utilities and to issue bonds payable only from the revenue thereof and secured by statutory mortgage liens thereon, bonds so issued and secured do not create a corporate indebtedness within the constitutional limitation (sec. 3, art. XI); and a city cannot be coerced into complying with an order of the railroad commission to make improvements in its waterworks system pursuant to like provisions of such act relative to extensions, additions, and improvements, if it would thereby exceed its constitutional indebtedness. *State ex rel. Morgan v. Portage,* 588

12. Although sec. 927—19*b*, Stats., authorized a city to execute a mortgage upon an entire public utility or a part thereof, and that "no municipal liability shall be created thereby," the city may not mortgage its property to secure the payment of a liability not in the nature of a purchase-money lien, if to do so would result in creating a corporate indebtedness in excess of the constitutional limitation. *Ibid.*

Same: Acquisition by condemnation: Valuation of property. See EMINENT DOMAIN.

13. A city in proceeding to acquire the property of a water company under the power of eminent domain is exercising the sovereignty of the state, which cannot be bartered away by a municipal ordinance or in any other manner. *Superior W., L. & P. Co. v. Superior,* 257

14. In a state law embodying a comprehensive plan for the regulation and control of public-service corporations and for the acquirement of their property in given cases by municipalities, the method provided for valuing such property with a view of awarding just compensation therefor is paramount to and exclusive of that contained in a city ordinance for determining such valuation; especially in the absence of allegation in the complaint that such method will not afford just compensation. *Ibid.*

15. In a proceeding by a city to acquire the property of a water company under the power of eminent domain, if the method of valuation of such property provided for in an ordinance of the city is productive of unconscionable results and will result in an excessive valuation, then it will be considered whether a court of equity should, in the exercise of its discretion, invoke its power to decree a specific performance. *Ibid.*

[16. Whether the performance by a city of an alleged contract with a public-service corporation is excused on the ground that the state has withdrawn from the city the power to perform it, not decided.] *Ibid.*

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Same: Franchise of utility: Municipality as agent of state. See CONSTITUTIONAL LAW, 10. STATUTES, 1.

17. An ordinance of the common council of a city granting to a public-service corporation certain rights, powers, and privileges constitutes a legislative franchise emanating from the state to such corporation; the common council merely acts as the agent of the state, and the privileges conferred by such ordinance are as much a legislative franchise as if it had been granted by an act of the legislature. *Superior W., L. & P. Co. v. Superior,* 257

18. In such case, if the corporation fails to comply with the requirements of the ordinance, or fails to perform any of the duties imposed upon it by the terms thereof, the state may maintain proceedings to vacate its charter or forfeit the franchise; and the state has the same right and authority to interfere therewith, change or alter the same as though it were granted directly by the legislature. *Ibid.*

19. The franchise of a water company to supply water to a city and its inhabitants is a contract between the company and the state. *Ibid.*

20. A proceeding by a city to acquire a waterworks plant under the public utilities law is in the nature of condemnation proceedings even where the water company has voluntarily accepted an indeterminate permit, in view of sub. 4, sec. 1797*m*—79, Stats. *Ibid.*

21. The franchise of a public utility corporation and the property devoted by it to the performance of the duties imposed on it by the franchise constitute an entirety, and the property, neither in its entirety nor in parcels, can be separated from the franchise; and, since the franchise is deemed the principal thing and is an incorporeal hereditament, the entire property assumes the character of personalty. *Ibid.*

22. The city can acquire title to the entire plant, though a portion of the intake pipe extended beyond the boundaries of the state, since the entire property of a water company used in the discharge of the duties imposed upon it by the franchise, together with such franchise, constitute an entirety partaking of the nature of personal property, and hence such portion of the plant as was physically located beyond the borders of the state could be purchased as personal property, having a situs within the state; and equity has ample power to compel the water company to convey such portion. *Ibid.*

23. A city may acquire title to a waterworks plant a part of which crosses the border of the state into another state, since in so doing it operates in its proprietary and not in its governmental capacity. *Ibid.*

Maintenance of highways: Defective streets and sidewalks: Notice.

24. In an action against a city for the death of persons riding in an automobile which struck a depression in the street and broke the steering gear so as to make the automobile unmanageable and resulted in a collision with a street car, an

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instruction that the intoxication of the driver of the automobile, if any, did not necessarily establish that he was not exercising due care did not invade the province of the jury when considered with the succeeding paragraph of the instruction to the effect that such fact, if found by the jury, was to be considered with all other facts to determine whether the driver was negligent. *Strang v. Kenosha,* 480

25. The existence of a depression in a city street a few hours before an accident is insufficient to charge the city with notice of the defect. *Ibid.*

26. Where the city had given permission to remove the paving to make a sewer connection, and after the completion of the work had inspected the place and had filled in a depression in the street and again inspected it the morning before the accident, the city is not charged with notice of the recurrence of a defect after such repairs, and is not liable unless it had actual or constructive notice of the subsequent defect and a reasonable opportunity to repair it. *Ibid.*

27. The rule that the topography of the locality, development of the community, standard of road construction, amount and character of traffic, etc., are to be considered in determining whether a given condition renders a highway defective, applies to sidewalks in cities as well as to country highways. *Hollan v. Milwaukee,* 392

28. A slope of seven inches in a cement sidewalk approaching the flagstone portion of the walk at a crossing where plaintiff slipped and was injured did not constitute a defect rendering a city liable for plaintiff's injuries. *Ibid.*

29. Sidewalks and crosswalks maintained by a city are not required to be perfect, it being sufficient that they are reasonably safe; and it is *held* in this case that a projection of one cobblestone one and one-eighth to two inches over the others in a walk across an alley belonged to that class. *Ibid.*

MUTUAL MISTAKE. See INSURANCE, 7. REFORMATION.

NEGLIGENCE.

See ADMIRALTY. AUTOMOBILES. BANKS, 1, 2. ELECTRICITY. EVIDENCE, 5. GUARANTY, 2. HIGHWAYS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 24-26. PHYSICIANS. RAILROADS. WORKMEN'S COMPENSATION.

Acts constituting negligence.

1. Private owners are not insurers against all accidents which may happen on their premises by reason of dangerous agencies thereon. *Bonniwell v. Milwaukee L., H. & T. Co.* 1

2. A boy eleven years old of average intelligence was negligent as matter of law in climbing and circling one of the towers of a high-tension electric transmission line where they bore danger signs plainly visible and he had been warned of the danger by his father and just before the accident was warned by a companion. *Ibid.*

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Reasonable anticipation of injury.

3. Where there was no structural defect in a vessel when turned over to the consignee of the cargo for unloading, the owner was not bound to anticipate that the unloading would be carried on by the consignee or the stevedores employed by it in so unusual a manner as to cause injury to its employees. *La Coco v. Massey Steamship Co.* 545

Contributory negligence. See AUTOMOBILES. ELECTRICITY. FACTORS, 1. MASTER AND SERVANT, 9-14. MUNICIPAL CORPORATIONS, 24. WORKMEN'S COMPENSATION, 2.

Notice of injury: Waiver: Estoppel.

4. Although sub. (5), sec. 4222, Stats., provides that no action to recover damages for personal injury shall be maintained unless a written notice or a summons and complaint is served upon the person alleged to have caused such damage, within two years after the happening of the event, the requirement is in the nature of a statute of limitations, which defendant may waive or which he may be estopped to assert. *Lockman v. Steensland,* 570

5. Negotiations between the parties for a settlement of plaintiff's claim for damages, in which no attempt was made to comply with the requirement of sub. (5), sec. 4222, Stats., as to giving notice, do not amount to a waiver by defendant of such requirement, though he had manifested a willingness to settle, and do not estop him from relying upon plaintiff's failure to serve such notice. *Ibid.*

NEW TRIAL.

See AUTOMOBILES, 12. VENUE, 2.

Discretion of court.

An order granting a new trial because an instruction, although technically correct, was so stated that it might have misled the jury, is not based on a misapprehension of the law, and the order is controlled by the rule which ordinarily obtains when a new trial is granted in the discretion of the court. *Seitz v. Ott,* 60

NOTICE.

Of agent. See INSURANCE, 2. PRINCIPAL AND AGENT, 1.
Of bank officers. See BANKS, 4.
Of defective street or highway. See HIGHWAYS, 1. MUNICIPAL CORPORATIONS, 25, 26.
Of injury. See INSURANCE, 9.
Of town meeting. See SCHOOLS, 1-3.

NOVATION.

See VENDOR AND PURCHASER, 5.

Parol consent of creditor.

The consent of plaintiff to the substitution of debtors may be shown by parol, notwithstanding the contract between defendant and the vendor was in writing. *Hedstrom v. Schaumann,* 354

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OFFICERS. See CORPORATIONS.
OPINION EVIDENCE. See EVIDENCE, 2.
OPTION. See VENDOR AND PURCHASER, 5.
ORDINANCES. See MUNICIPAL CORPORATIONS. STATUTES, 1.

PARENT AND CHILD.

See BROKERS, 6. DAMAGES, 2. DIVORCE, 2, 4. INFANTS. SCHOOLS, 9. WILLS, 2.

Right of father to custody: Earnings of child: Expenses.

1. The right of the father or, in case of his death, of the mother to the custody of a minor, preserved by sec. 3964, Stats., is a substantial right. *In re Alley,* 85
2. Where plaintiff was a minor and there was no evidence that she was emancipated, it was prejudicial error, in a personal injury action, to charge the jury that she was entitled to recovery for medical expenses and for all impairment in earning capacity from the time of the injury, plaintiff's parent being liable for her medical expenses and entitled to her earnings until her majority. *Grimes v. Snell,* 557

PAROL EVIDENCE. See EVIDENCE, 3. FRAUDS, STATUTE OF, 1.
PARTIES. See APPEAL, 9, 10. ASSIGNMENTS.

PARTNERSHIP.

See JOINT ADVENTURERS.

Contract: Essentials.

1. In the law of partnership the element of contract between the parties associated to form a copartnership, in the proper sense of the term, is a fundamental requisite. *Sander v. Newman,* 321
2. Partnership contracts, like other contracts, are governed by the intent of the parties; and the generally accepted test as to whether a partnership exists is that a partnership is formed when the parties involved in the transaction have the intention that they should be partners. *Ibid.*

PATIENT. See PHYSICIANS.
PERSONAL INJURIES. See ADMIRALTY. AUTOMOBILES. DAMAGES. ELECTRICITY. EVIDENCE, 5. HIGHWAYS. MASTER AND SERVANT. PARENT AND CHILD, 2. RAILROADS. WORKMEN'S COMPENSATION.
PERSONAL PROPERTY. See BAILMENT. FRAUDULENT CONVEYANCES. GIFTS. LANDLORD AND TENANT, 3, 4. SALES. TAXATION.
PERSONAL REPRESENTATIVES. See EXECUTORS.

PHYSICIANS AND SURGEONS.

Malpractice: Hypothetical question: Form.

In an action by a physician for medical services rendered defendant and his wife wherein defendant counterclaimed for damages for plaintiff's alleged negligence in treating the

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wife after childbirth, hypothetical questions to medical witnesses by defendant's counsel, embracing as an element the existence of pus in the uterus, constituted prejudicial error, in the absence of evidence as to the existence and nature of the pus. *Schnetzky v. Zanto,* 160

PLEADING.

See APPEAL, 9, 10. VENUE, 1.

Admission in pleadings: Effect.

Where a material fact is alleged in the complaint and admitted in the answer it becomes a verity in the case, evidence in respect thereto being immaterial; and a party is concluded by such an allegation as long as the pleadings remain unamended. *Savich v. Hines,* 181

Amendment. See SALES, 6.

Severance. See ACTION.

In criminal cases. See CRIMINAL LAW.

POLICY OF INSURANCE. See INSURANCE, 3-9.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1.

PRESCRIPTION. See EASEMENTS, 1.

PRESUMPTIONS. See MORTGAGES. TRIAL, 3.

PRICE. See SALES.

PRIMARY ELECTIONS. See CONSTITUTIONAL LAW, 3, 4, 6-8. ELECTIONS, 2, 3.

PRINCIPAL AND AGENT.

See AUTOMOBILES, 8-11. BROKERS, 6. FRAUD, 1-3. INSURANCE, 1, 4, 5. LANDLORD AND TENANT, 5. SALES, 9. SHERIFFS, 3, 4.

Knowledge of agent imputed to principal.

1. Where a landowner in negotiating a lease of his property was represented throughout the entire transaction by an agent, the landowner, who paid commissions to certain persons who in fact represented the lessees, is charged with whatever knowledge his agent may have had as to such persons' agency for the lessees. *On rehearing:* The lessor's agent in negotiating the lease with agents who did not pretend to be negotiating in their own behalf was chargeable as a matter of law with knowledge of the fact that the agents represented some undisclosed principal. *Weinhagen v. Hayes,* 233
2. An agent's duties are not lessened or modified because he calls himself a broker or factor, and agents representing prospective lessees are not justified in accepting commissions from the opposite party, regardless of custom. *Ibid.*

Same: Payment of commissions to agents of third party: Fraud.

3. Though a lessor, who paid commissions to agents representing the lessees without their knowledge or consent, had no fraudulent purpose, his act whereby he made the lessees' agents his own is a fraud upon the lessees. *Weinhagen v. Hayes,* 233

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4. Where the lessor, without the knowledge or consent of the lessees, paid commissions to their agents, the lessees on discovery of the fraudulent conduct of their agents have a right to rescind the contract. *Ibid.*

Same: Rescission of contract: Waiver.

5. In an action by a lessor to recover amounts due under a long-time lease which the lessees rescinded for fraud, the lessor having made payments to their agents, the evidence is *held* to establish the fact that the lessees did not learn of the payments until a few months before the rescission. *Weinhagen v. Hayes,* 233

6. The fact that the lessees, after discovering that the lessor had made payments to their agents who negotiated the lease, attempted to dispose of the property, while a circumstance on the question of waiver of the right to rescind is not conclusive. *Ibid.*

7. Where the facts as to the conduct of the lessees, after discovering that their agents had received commissions from the lessor, were not in dispute, the question whether they had waived the right to rescind the contract is one of law. *Ibid.*

8. An inference of intent to waive the right to rescind does not readily arise where the situation in which the party required to elect finds himself is the result of the fraud or misconduct of the opposite party. *Ibid.*

9. Where the rights of the parties in nowise changed after the lessees discovered that the lessor had paid commissions to their agents, mere delay of a few months on the part of the lessees in announcing an election to rescind will not establish a waiver of such right, the lessees having incurred large obligations outside of and beyond the contract and having expended considerable sums of money. *Ibid.*

Duty of agent toward principal.

10. Where plaintiff sought the advice of the manager of a trust company, who was an attorney, as to the advisability of purchasing a certain farm, and while acting as agent for plaintiff the manager advised against a purchase which plaintiff was considering and called attention to and recommended the purchase of defendant's farm, hurried along its inspection, and said nothing regarding an abstract of title, and during all this time he was, without plaintiff's knowledge, in reality agent for the defendant, the failure to disclose the true relationship existing between the manager and the defendant constituted a fraud on plaintiff warranting the annulment of a contract of exchange of lands between him and defendant. *Becker v. Spalinger,* 443

11. Having been hired as plaintiff's agent it was the duty of the attorney to advise him with respect to the transaction in question and to bring home to plaintiff knowledge of his engagement as an agent for compensation on the part of defendant, and, having failed to do so, he was guilty of disloyalty toward the plaintiff entitling plaintiff to rescind the entire transaction. *Ibid.*

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PRINCIPAL AND SURETY.

Contract of suretyship: Nature.

A surety on a bond given by a lessee is not liable where the lease was rescinded for the lessor's fraud in paying commissions to the lessee's agent, the obligation in nowise guaranteeing the genuineness of the lease. *Weinhagen v. Hayes,* 233

PRIVILEGED COMMUNICATIONS. See WITNESSES, 1.

PROBATE OF WILLS. See WILLS.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROHIBITION.

When writ issued: Invalid service of process.

1. This court in *Petition of Pierce-Arrow Motor Car Co.* 143 Wis. 282, restricted its superintending control by writs of prohibition to a minimum; but, without intent to overrule that decision, it is *held* that a writ of prohibition will issue if a careful consideration of all the facts shows that a valid service has not been made. *Petition of Inland Steel Co.* 140
2. In cases involving the validity of service, extraordinary hardship is inherent because the defendant must suffer a default judgment to test the question of the validity of the service, or else apply for a writ of prohibition, as there is no appeal from an order holding the service valid, and by appearing on the merits the question of jurisdiction is waived. *Ibid.*

PROXIMATE CAUSE. See AUTOMOBILES, 5. NEGLIGENCE, 3. RAILROADS, 1.

PUBLIC BUILDINGS. See SCHOOLS, 8.

PUBLIC UTILITIES. See CONSTITUTIONAL LAW, 10. ELECTRICITY. MUNICIPAL CORPORATIONS, 11-23. TAXATION, 12, 13.

PURCHASER. See VENDOR AND PURCHASER.

QUESTIONS FOR JURY. See APPEAL, 16-19. AUTOMOBILES, 3, 6. BANKS, 2. EVIDENCE, 2. INSURANCE, 9. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 24.

RAILROADS.

See MASTER AND SERVANT, 10, 11.

Injuries to employees: Negligence: Brakeman falling off car.

1. Where a brakeman, after lying sick or asleep on top of a car while it was in motion, arose and walked off the car after it had stopped, the failure of defendant's train crew, when informed of his position, to stop the car at once and go to his rescue was not the proximate cause of his death. *Murnane v. Chicago, M. & St. P. R. Co.* 171
2. Where the engineer of the train, immediately upon being informed of the brakeman's dangerous position on top of the car, directed his fireman to look for him, and before the fireman reached him and after the train had stopped decedent

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arose and walked off the car, there was no basis for the finding of the jury that the engineer was negligent in operating the train after being informed of the brakeman's position. *Ibid.*

3. The evidence is *held* sufficient to sustain the trial court in changing the special verdict so as to find that the brakeman's fall from the car was not caused by the motion thereof. *Ibid.*

Same: Federal employers' liability: Interstate commerce.

4. In an action by an employee of a railroad who was injured while carrying a drawbar in its yards, it is *held* that the finding of the trial court that the plaintiff was engaged in interstate commerce is against the clear preponderance and great weight of the evidence, taken in connection with an allegation in the complaint that plaintiff was carrying the drawbar from one pile to another in the yards, as against his testimony at the trial that he was carrying it to a car destined for an interstate journey. *Savich v. Hines,* 181

[5. Whether the gathering of scrap by a railroad company to transport by its own agencies, for its own purposes, to another point on its system, constitutes interstate commerce, not decided.] *Ibid.*

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See COVENANTS. DEDICATION. EASEMENTS. EMINENT DOMAIN. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 11-23. NEGLIGENCE, 1. PRINCIPAL AND AGENT. SHERIFFS, 4-6. TAXATION.

RECEIVING STOLEN GOODS.

Guilty knowledge: Proof: Instructions.

1. In a prosecution under sec. 4417, Stats., for buying, receiving, concealing, or aiding in the concealment of stolen property knowing the same to be stolen, it is essential to a conviction that the jury shall find beyond a reasonable doubt that the receiver knew or had a guilty belief that the property was stolen. *Meath v. State,* 80

2. In a prosecution for such offense, guilty knowledge or its equivalent, guilty belief, may be proven by circumstantial evidence. *Ibid.*

3. An instruction which warranted the jury in finding a verdict of guilty if they believed the facts and circumstances were such that the defendant, in the exercise of ordinary diligence, ought to have known an automobile was stolen, is erroneous; and in this case, where the evidence is largely dependent upon the testimony of the thief, it was prejudicial. *Ibid.*

REFORMATION OF INSTRUMENTS.

See SALES, 3. VENDOR AND PURCHASER, 4.

Necessity of reformation: Mutual mistake.

Without reformation a defendant sued on contract could not, in an action at law, avail himself of the affirmative defense of mutual mistake in the execution of the contract. *Newport M. Co. v. Firemen's Ins. Co.* 401

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REHEARING. See APPEAL, 25.

RELEASE. See GUARANTY. MORTGAGES.

RENT. See LANDLORD AND TENANT.

RENT REGULATION. See CONSTITUTIONAL LAW, 5.

RESCISSION. See CANCELLATION. FRAUD, 5. LANDLORD AND TENANT, 5. PRINCIPAL AND AGENT, 4-9, 11. PRINCIPAL AND SURETY. SALES, 2.

RES GESTÆ. See EVIDENCE, 5.

RESTRAINT OF TRADE. See COVENANTS, 3.

REVIEW. See APPEAL.

REVOCATION OF WILLS. See WILLS, 1.

ROADS AND STREETS. See AUTOMOBILES. DEDICATION. HIGHWAYS. MUNICIPAL CORPORATIONS, 24-29. TRIAL, 3.

SALES.

See BAILMENT, 1. BROKERS. FACTORS. FRAUDS, STATUTE OF.

Executory agreements: Option to rescind.

1. An instrument whereby a person who was to receive an automobile as part payment on lands agreed, in case the sale of the lands was consummated, to accept a sum of money from her broker as a release from all claims and to transfer the automobile to the broker, is not a bill of sale, but an executory contract of sale, in view of a clause in the agreement which provided that in case the automobile was not transferred to the broker the money must be refunded. *Rowlands v. Electrical C. Co.* 165
2. The executory contract of sale, reserving an option to rescind, made before the seller acquired title to the car, is rescinded by the seller making a bill of sale to the plaintiff after acquiring title to the car. *Ibid.*

Parties: Reformation of contract.

3. If defendants desired to defend on the ground that a contract was in fact with another than themselves, they should have interposed an equitable counterclaim for reformation on the ground of mutual mistake. *Page W. W. F. Co. v. Staudenmayer,* 154
4. An order for fencing to be shipped to G. S. and charged to E. S., by whom the order was signed, was when accepted a contract between the seller and E. S., whether or not there was also a contract between the seller and G. S., and could not be contradicted by showing the prior course of dealing between the parties and that as a matter of fact the seller knew and understood that the order was made by G. S. through E. S. *Ibid.*

Damages for failure to deliver goods.

5. In the absence of a showing of special damages, the measure of damages for a seller's failure to deliver goods at the time

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specified in the contract of sale is the difference between the contract price and the market price at the time and place when and where the contract was breached. *Page W. W. F. Co. v. Staudenmayer,* 154

6. In an action against E. S. and G. S. for the purchase price of fencing where the answer of G. S. adopted the theory that E. S. acted merely as his agent in buying the fencing, in which event E. S. suffered no damage from delay in delivery, and G. S. did not and could not, on adopting the agency theory, claim damages from E. S., the court properly refused to allow an amendment to the answer of E. S. in order to assert a counterclaim for the delay. *Ibid.*

7. The increased cost of labor due to delay in delivery of fencing, and the loss due to the inability to use the pasture which the buyer intended to inclose, were not recoverable from the seller in the absence of evidence showing that when the contract was made it was in the contemplation of the parties that a breach of the contract would result in special damages. *Ibid.*

Guaranty as to quality: Breach: Remedies of buyer.

8. In an action for breach of a contract for the sale of hides, the jury's conclusion, sustained by the civil court of Milwaukee county, that the contract contained a guaranty by the seller that not more than fifty per cent. of the hides would be of second quality, is *held* to be warranted by the evidence and the admissions in the pleadings. *Sauer Hide Co. v. Stein,* 185

9. Plaintiff offered a lot of hides to a broker at twenty-five cents a pound, and by telephone said it would guarantee their running not over fifty per cent. of No. 2's, and in answer to an offer of twenty-four and one-half cents a pound plaintiff wired that it would accept such price with all No. 2's included. The broker's prospective customer did not agree to such conditions, and the broker offered the hides to defendant, informing him of plaintiff's guaranty. Defendant accepted the hides, and the broker wired plaintiff, "Accept hides as offered." *Held* that, as the broker was not defendant's agent nor acting as broker between plaintiff and defendant when plaintiff's telegram was sent, defendant was not precluded by the telegrams from showing the offer presented to him by the broker and accepted by him. *Ibid.*

10. In the absence of any provision to the contrary in the contract, a custom in the particular line of business permitting the buyer to treat the contract as broken if the first shipment contained more second-quality hides than agreed, and leaving it wholly at his option whether to accept subsequent shipments making up the deficiency in first-quality hides, was controlling. *Ibid.*

Sales of land. See VENDOR AND PURCHASER.

SATISFACTION of mortgages. See MORTGAGES.

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SCHOOLS AND SCHOOL DISTRICTS.

Consolidating school districts: Notice of meeting.

1. Where the notice of a meeting of town boards for the purpose of consolidating two school districts, left with the clerk of one of the districts under sec. 40.04, Stats., failed to state the time of the meeting, a finding of the trial judge that due notice was given is supported by evidence that the person serving the notice had with him another paper in which the blanks were properly filled which he read and repeated to the clerk, and establishes the fact that the town boards gained jurisdiction to proceed. *Kittelson v. Dettinger,* 71
2. Where town boards made an order consolidating school districts, copies of which were filed with the town clerks, county superintendent, and school district clerks, and notice of the first district meeting was made and signed as provided in sec. 40.02, Stats., and such meeting was held and officers elected who filed acceptances, the district was organized on the date of such first meeting, within the meaning of sec. 40.03, providing that a district shall be deemed legally formed when duly organized and exercising the rights and privileges of a district for four or more months and that no appeal or action attacking the legality of the formation of the district shall be taken after such period. *Ibid.*
3. Under sec. 40.02, providing that town boards creating or consolidating school districts shall make a "written order," the failure of the individual members of the town boards to sign an order consolidating the districts, duly made and filed, if an irregularity, was not a jurisdictional defect fatal to the organization of the district. *Ibid.*
4. Though the statutes must be complied with in acquiring jurisdiction to consolidate school districts, they will not be construed so strictly that unimportant mistakes in subsequent proceedings will defeat the wishes of the communities affected or the purpose for which the statutes were enacted. *Ibid.*

Supervisory control of state superintendent: Review.

5. The provisions of the law relating to the establishment of union free high schools (sec. 40.47, Stats. 1919) confer no power, nor do they attempt to confer power, upon the state superintendent to review the regularity of the proceedings had pursuant to its provisions, and in that respect sec. 40.47 is the same as sec. 497, Stats. 1915, now a part of sec. 39.01, it being the intent and purpose of the statute to confer upon the superintendent, in the exercise of the supervisory control vested in him by sec. 1, art. X, Const., the power to determine whether or not the educational interests of the community involved will be best served by the incorporation of the proposed high school. *State ex rel. McKenzie v. Brown,* 498
6. A petition in *certiorari* to review a proceeding resulting in the establishment of a union free high school should be quashed where it does not allege that the proceedings were certified

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to or approved by the state superintendent, since such a proceeding results in no determination in the absence of such certification or approval by the state superintendent. *Ibid.*

7. The use of the word "matters" in sec. 1, ch. 184, Laws 1901 (sub. (2), sec. 39.01, Stats. 1919), providing that no review of the decisions of the state superintendent of public instruction on matters decided by him shall be had unless proceedings by *certiorari* or other appropriate action be brought within thirty days after such determination, indicates that it was intended to cover all decisions made by the state superintendent, whether the controversies in which the decisions were made reached him by way of appeal or were instituted before him in the first instance; and *certiorari* to review proceedings resulting in the establishment of a union free high school must be brought within thirty days after the approval by the state superintendent of the proposed school. *Ibid.*

Safe-place-to-work statutes: Applicability to schools.

8. Sec. 2394—48, Stats., requiring every owner of a public building to so construct it as to render it safe, and sec. 2394—49, providing that no owner or other person shall construct or maintain any public building that is not safe, do not apply to school districts or school buildings or render a school district liable to a pupil for injuries from a defect in the building, in view of sub. (13), sec. 2394—41, defining the term "owner" and not mentioning school districts, sec. 2394—4, expressly including school districts in those required to make compensation for injuries to employees, sec. 2394—51, giving the industrial commission supervision of the public buildings referred to, and ch. 30, Laws 1913 (now sec. 39.02. Stats.), making a different provision for the inspection of school buildings. *Srnka v. Joint District No. 3,* 38

Compulsory school attendance. See INFANTS, 1-3.

9. Under the statutes relative to compulsory school attendance. a parent no longer has the right to decide whether his child shall attend school or work, the law determining that for him. *In re Alley,* 85

SELF-INCRIMINATION. See WITNESSES, 3-7.

SERVANT. See MASTER AND SERVANT.

SERVICE of process. See COURTS. PROHIBITION, 2. SHERIFFS.

SETTLEMENT. See COMPROMISE AND SETTLEMENT. NEGLIGENCE, 5.

SEVERANCE. See ACTION.

SHERIFFS.

Compensation: Necessary expenses in executing writ.

1. Since under sub. (24), (25), sec. 59.28, Stats. 1919, a sheriff is entitled to reimbursement for necessary expenses incurred in serving a writ or other process, he was liable for services rendered by a wrecking company employed by his deputy to remove heavy machinery in the execution of a writ of restitution. *American W. Co. v. McManus,* 300

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2. A sheriff who undertakes the service of a writ without demanding his fees and charges in advance waives their prepayment. *Ibid.*

3. A deputy sheriff acts as the general agent for the sheriff while in the discharge of official duties and has authority to bind the sheriff in incurring expenses in the service of a writ. *Ibid.*

4. Where a writ of restitution was issued upon a judgment in favor of a landlord, commanding the sheriff to cause the tenant to be immediately removed from the premises, and the execution of the writ involved the removal of heavy machinery and other property that could be moved only by tackle and other suitable apparatus, and the sheriff employed a wrecking company which did the work at considerable expense, the sheriff could recover the amount of his disbursements from the landlord, who did not inform the sheriff that the ordinary execution of the writ was not desired. *Ibid.*

5. Since sec. 59.28, Stats., provides that "Every sheriff shall be entitled to receive the following fees for his services, except for services in actions or proceedings before justices of the peace, for which fees are specially provided by law," a sheriff in serving writs issued out of justices' courts is confined to the fees prescribed for constables; but where such fees are not provided he is entitled to charge the fees prescribed in sec. 59.28, including reimbursement for all necessary expenses incurred in the execution of the writ of restitution, as provided by sub. (24) and (25). *Ibid.*

6. Under sec. 3779, Stats., providing that no disbursements to officers or others shall be allowed unless the items are particularly specified and proved and were necessary and reasonable in the opinion of the justice, a constable is entitled to the same charge for disbursements in executing the writ of restitution as the sheriff under sub. (24) and (25), sec. 59.28, there being no provision in the schedule of fees to reimburse constables. *Ibid.*

SIMPLE-TOOL DOCTRINE. See MASTER AND SERVANT, 11.

SOLDIERS' BONUS LAW.

Residents of Wisconsin inducted into service in another state.

Under the Soldiers' Bonus Law (ch. 667, Laws 1919), granting a bonus to "each soldier, sailor, marine, and nurse . . . who at the time of his or her induction into the service was a resident of Wisconsin," a resident of this state registering in Michigan pursuant to a letter received from a Michigan registration board and there inducted into the service is entitled to the bonus. *Lindemuth v. Philipp,* 76

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW, 9. ELECTIONS, 2.

SPECIAL VERDICT. See TRIAL, 1, 2.

STATE SUPERINTENDENT OF SCHOOLS. See SCHOOLS, 5-7.

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STATES. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 17-20.
STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.
STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

See CONSTITUTIONAL LAW. SCHOOLS, 4.

Amendment: Merger.

1. An amendment to a city ordinance which grants a franchise to a water company is merged in and becomes a part of such ordinance, and stands on no different footing with reference to the power of the state to assert its authority in respect thereto than any other provision contained in the ordinance. *Superior W., L. & P. Co. v. Superior,* 257

Constitutionality. See ELECTIONS, 2, 3. INJUNCTION. MUNICIPAL CORPORATIONS, 2. TAXATION, 3, 4, 8, 9, 16.

Construction. See APPEAL, 3-8. AUTOMOBILES, 1. BASTARDS, 2. BROKERS, 3, 5. CONSTITUTIONAL LAW. CORPORATIONS. COURTS. GUARANTY, 1. INFANTS. INSURANCE, 1, 2. JOINT ADVENTURERS, 5. MARRIAGE. MUNICIPAL CORPORATIONS, 1-5, 8, 11, 12. SCHOOLS. SHERIFFS, 1, 5, 6. SOLDIERS' BONUS LAW. TAXATION. TRUSTS, 2. VENUE, 1. WITNESSES, 3-7. WORKMEN'S COMPENSATION, 1.

Title: Embracing more than one subject.

2. Ch. 9, Laws 1911, relating to the civil court of Milwaukee county, is not unconstitutional as a private or local law embracing more than one subject not sufficiently expressed in the title. *State ex rel. Binner v. Buer,* 120

STOCK DIVIDENDS. See TAXATION, 7-9.
SUFFRAGE. See ELECTIONS.
SUPREME COURT. See APPEAL.
SURETY. See PRINCIPAL AND SURETY.
SURFACE WATER. See EASEMENTS.
SURGEONS. See PHYSICIANS AND SURGEONS.

TAXATION.

See EVIDENCE, 1. MUNICIPAL CORPORATIONS, 4, 5.

Inheritance taxes: Proceeds of life insurance policies.

1. Under sub. (7), sec. 1087—1, Stats. (added by Laws 1915, ch. 253), making insurance payable on the death of the insured subject to inheritance taxes, the intention of the legislature was to include only such life insurance as the insured personally effects on his own life for the benefit of others and on which he pays the premiums. *Will of Allis,* 527
2. Under sec. 2347, Stats. (providing that one effecting insurance on his own life or on the life of another may make the policy payable or assign it to a married woman and that it shall be her sole and separate property, and in case of her surviving

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the term of the policy the amount shall be payable to her free from the control, disposition, or claims of her husband), and ch. 15, Laws 1903 (providing that she may, with the written consent of the insured, assign or dispose of the policy), the rights of a wife as a beneficiary under a policy effected by her husband on his own life are contingent on her surviving the term of the policy. The insured retains a substantial interest in the policy which does not pass until his death, and the proceeds are properly subjected to inheritance taxes by sub. (7), sec. 1087—1, Stats. *Ibid.*

3. The legislature has the power to levy inheritance taxes by the exercise of the power of reasonable regulation and taxation of the transfer of property. *Ibid.*

4. If a husband insures his life for his wife's benefit and pays premiums thereon, he transfers property to her, in legal effect the transaction being the same as a gift. The transfer of property to the beneficiary, which becomes consummated at the time of the death of the insured, may be taxed by the legislature. *Ibid.*

5. Lack of direct evidence as to who paid the premiums on policies of life insurance necessarily leads to the presumption that the insured complied with the terms of the policy and paid the premiums. *Ibid.*

Same: Value upon which tax is computed.

6. Under sec. 1087—13, Stats., requiring property to be appraised at its fair market value for inheritance-tax purposes, and sec. 3821, requiring the general appraisers of a decedent's property to fix its value in money, the terms "fair market value" and "value in money" are practically identical, the "value in money" being the fair equivalent in money for the thing valued and the "fair market value" the sum for which it could be exchanged in the open market under fair conditions, the purpose of the valuation not being an element to be considered in either case. *Will of Matthews,* 220

Income taxation: Stock dividends.

7. The rule known as the American rule, that, where there is an ownership of stock for a term and a remainder over, income accumulated during the term and distributed as dividends, regardless of how distributed, goes to the owner for the term, while followed in Wisconsin, is not deemed controlling on the question as to whether, under the amendment of the constitution adopted in 1908, stock dividends are included within the word "incomes" and therefore taxable. *State ex rel. Dulaney v. Nygaard,* 597

8. Under sec. 1, art. VIII, Const., as amended in 1908, providing that the rule of taxation shall be uniform and that taxes may be imposed on incomes, the act of 1917 (sec. 1087*m*—2, Stats.), declaring that the term "income" shall include all dividends derived from stocks, the term "dividends" including any distribution, whether in cash or in the stock of a corporation, is valid. *Ibid.*

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9. The word "income," as used in the amendment, has been given in former cases a liberal rather than a technical meaning; and when a clause in a constitution or an amendment thereof confers new broad powers upon the legislature, it is not within the province of the courts to limit the grant by technical requirements. *Ibid.*

Same: Objection to valuation: Disclosure.

10. Under sec. 1061, Stats., a taxpayer must first appear before the board of review, object to the valuation, and make full disclosure before bringing an action to question the assessment; and under sec. 1087*m*—18 the same rule prevails in the administration of the income tax act. *State ex rel. Bues v. Phelps,* 203

11. The making of a return of income, although under oath, is not the full disclosure contemplated by the statute and is not conclusive on the board of review; and since the return showed appellant was liable to some assessment, the board had jurisdiction of the person and the subject matter, and he waived his right to bring an action by failing to object and make full disclosure. *Ibid.*

Taxation of terminal properties.

12. Under sub. (4), sec. 1211—8, Stats., requiring the state tax commission to make a separate valuation of docks, piers, wharves, and grain elevators of public utilities, and sec. 1211—29, providing that taxes based on such separate valuation shall be distributed to the towns and cities in which such docks, etc., are located, the city in which such properties are located is entitled to the full benefit of the taxes derived therefrom without any direct or indirect impairment, and the valuation thereof should not be included in the county board's equalization. *State ex rel. Ashland v. Ashland County,* 49

13. Under sec. 1211—6, Stats., declaring terminal properties of public utilities personal property to be assessed at the capital of the state, the local assessor has no duty to perform as to the assessment of such terminals. *Ibid.*

Collection of taxes: Error in tax warrant.

14. The fact that a town clerk inserted erroneous amounts which were to be paid to the county treasurer in the blank spaces in the warrant attached to the tax roll when delivered to the town treasurer, under sec. 1081, Stats., did not affect the validity of the tax, such error relating only to the distribution of the money after collection of the tax. *Grimm v. Bayfield County,* 43

15. The amount to be paid to the county treasurer for state and county taxes is legally determined, and a mistake made by the town clerk or town treasurer, or any other official, in that respect would not be binding on the town and is of no consequence to the taxpayer, since it will not be presumed that the county treasurer would receive from the town treasurer

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more than the amount levied against the town, and, if he did so, the county would acquire no title to the funds and they could be recovered by the town. *Ibid.*

Tax sales: Posting and publication of notice. See CONSTITUTIONAL LAW, 9.

16. Under sec. 1130, Stats., the posting as well as the publishing by the county treasurer of a statement of all lands upon which the taxes have not been paid, together with a notice of tax sale thereof, is essential to the validity of a tax deed, the word "post" having a meaning distinct from that which is implied by the term "publication." *Pedro v. Grootemaat,* 412

17. The deposit by plaintiff of the amount of taxes, etc., required by secs. 1210*h* and 1210*h*—1, Stats., as a prerequisite to the maintenance of an action to set aside a tax sale or to cancel a tax certificate or to restrain the issuing of a tax deed, is not necessary in an action of ejectment, where plaintiff is entitled to recover by reason of a defect in defendant's tax title, this matter being governed by sec. 3087, Stats. *Ibid.*

18. Upon a determination by this court that the judgment in defendant's favor was erroneous because of defects or deficiencies occurring in the tax proceedings, the judgment is ordered affirmed, unless within ninety days the plaintiff will repay the amounts expended by the defendant for taxes and disbursements with interest at the rate of fifteen per cent. *Ibid.*

TENANT. See LANDLORD AND TENANT.

TERMINALS. See TAXATION, 12, 13.

TITLE.

To land. See COVENANTS. DEDICATION. DIVORCE, 7, 9. EMINENT DOMAIN. GIFTS. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 11, 23. TAXATION, 16-18. TRUSTS, 2. WILLS, 1, 3, 4.

To personal property. See BAILMENT. BANKS. CONVERSION. COURTS. FRAUDULENT CONVEYANCES. GIFTS. LANDLORD AND TENANT, 3, 4. SALES. VENDOR AND PURCHASER.

TORTS. See ASSAULT AND BATTERY. BAILMENT, 1. BANKS. CONVERSION. ELECTRICITY. EVIDENCE, 5. FACTORS. FRAUD. FRAUDULENT CONVEYANCES. GIFTS. GUARANTY. JOINT ADVENTURERS, 3-5. LANDLORD AND TENANT, 5. MORTGAGES. PHYSICIANS. PRINCIPAL AND AGENT. TRIAL, 2.

TOWNS. See EVIDENCE, 1, 3, 4. SCHOOLS, 1-4.

TRESPASSERS. See ELECTRICITY, 4.

TRIAL.

See CONTEMPT. COSTS. EVIDENCE.

Place of trial. See CRIMINAL LAW, 2, 3. VENUE.

Adverse examination. See ADVERSE EXAMINATION.

Examination of witnesses: Hypothetical questions. See PHYSICIANS.

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TRIAL—con.

Cumulative testimony. See FRAUD, 3.

Special verdict: Burden of proof.

1. When defensive matter only is pleaded by a defendant, the trial court should so frame the special verdict that the burden of proof rests on the plaintiff to establish his claims. *Sloan v. Brown County State Bank,* 36
2. In an action against a bank for the conversion of corporate stock pledged as collateral to a loan to a third person, where plaintiff alleged in his complaint that he pledged the stock, the fact that the bank in its answer averred that the stock was pledged by the borrower did not change the burden of proof, and the court erred in his charge in practically informing the jury that plaintiff could recover unless the bank could disprove his claim that he pledged the stock. *Ibid.*

Presumed findings by court: Support.

3. Where the issue of notice of an alleged defect in a street was not submitted to the jury and there was no request for its submission, this court must assume that the trial court found such issue in favor of the plaintiffs (sec. 2858*m*, Stats.); but such presumed finding, however, must find support in the evidence and will be made only where there is evidence to sustain it. *Strang v. Kenosha,* 480

Form of findings by court. See APPEAL, 12, 13.

4. Sec. 2863, Stats., requiring the filing of findings of fact and conclusions of law by the trial court, is not satisfied by the filing of an opinion containing a statement of evidentiary facts followed by a discussion of the law, as the ultimate facts in issue should be found in every case. The failure to follow the statute, however, is not necessarily reversible error. *Schmoldt v. Loper,* 152

Instructions to jury. See AUTOMOBILES, 2. HIGHWAYS, 3. MUNICIPAL CORPORATIONS, 24. NEW TRIAL. PARENT AND CHILD, 2. RECEIVING STOLEN GOODS, 3.

Burden of proof. See WITNESSES, 4.

Verdicts: Change of answers by court. See APPEAL, 16-19.

5. When a special verdict has been returned it is an invasion of the province of the jury for the court to change the findings if there is evidence which, if undisputed, supports them. *Industrial Co-operative Union v. Lewis,* 466
6. Where the evidence is insufficient to support a special verdict of the jury and its sufficiency is challenged by all the usual motions before and after verdict, judgment may be entered notwithstanding the verdict and without the court changing the answers found by the jury. *Elmergreen v. Kern,* 622
7. In determining whether a verdict is against the great weight of the evidence the trial court cannot consider evidence which is not only immaterial but is without probative force. *Industrial Co-operative Union v. Lewis,* 466

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Costs. See APPEAL, 8. COSTS.

New trial. See NEW TRIAL.

Trials in criminal cases. See CRIMINAL LAW.

TRUSTS.

See DIVORCE, 9, 10. GIFTS. JOINT ADVENTURERS, 5.

Construction of instrument.

1. While the words "in trust" or "for trust," used in a conveyance, will, or decree, suggest a purpose to create a trust, they are not conclusive of such intent. *Kuether v. State,* 538

Resulting trusts: Conveyance taken in violation of trust.

2. Where heirs claimed that defendant held lands in trust, but he asserted a gift on the part of their mother, a widow, and further set up that, as she was ineligible to purchase the land, neither she nor her heirs could question his title, *held* that, while sec. 2077, Stats., declares that when a grant for a valuable consideration shall be made to one person and the consideration paid by another no use or trust shall result, but title shall vest in the person named, yet, as sec. 2079 declares that sec. 2077 shall not extend to cases where the alienee shall have taken the same as an absolute conveyance in violation of some trust, defendant cannot, where he failed to establish the gift, deprive the heirs of their right to recover the property. *Beilfuss v. Dinnauer,* 507
3. Under the circumstances, defendant took title as trustee for the widow, and under the evidence in the case it is *held* that he was not entitled to the same on the theory that it was a gift. *Ibid.*

UNIFORMITY of municipal government. See CONSTITUTIONAL LAW, 7-9.

UNION FREE HIGH SCHOOLS. See SCHOOLS, 5.

VENDOR AND PURCHASER.

See ESCROWS.

Construction of contract: Subject matter: Land and personalty.

1. A contract for the sale of a farm, together with live stock, hay, grain, etc., "everything now on the farm except household goods," must be deemed merely to include personalty belonging to the seller, and not property on the premises not belonging to him. *Adney v. Kraus,* 610
2. Where a contract for the sale of a farm, including personalty, did not attempt to include personalty on the premises not belonging to the vendor, the question whether the purchaser, who converted timber on the premises which had been previously sold to and cut by a third person, was responsible, or whether the vendor was responsible, depends on whether the

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purchaser knew of the sale and that the timber did not pass, and for that reason evidence as to his knowledge is admissible in construing the contract. *Ibid.*

3. In an action for the conversion of cut timber on a farm, which timber had been previously sold to plaintiff, the evidence is *held* to establish that the purchaser of the farm knew before purchasing that the timber had been sold; hence, though the sale included personalty on the farm, title to the timber which had been cut did not pass. *Ibid.*

4. The evidence is also *held* to show that the contract expressed the intention of the parties and that it was not intended to include the timber belonging to a third person which the purchaser converted, and reformation of the instrument is entirely unnecessary to protect the vendor. *Ibid.*

Performance: Extension of time to make payments.

5. Plaintiff and defendant, purchasers of land under separate contracts, had both defaulted on their contracts with the vendor after plaintiff had paid $100 and defendant $900, and, plaintiff desiring to get his money back, the vendor agreed by letter that defendant's contract should be extended to allow defendant to make a payment at a future date and that plaintiff's $100 payment should be credited thereon, "for which credit you [defendant] are to make a satisfactory deal with" plaintiff. Defendant did not make the necessary payment to extend his contract, but later, on several occasions, promised to pay plaintiff the $100, and plaintiff looked to him therefor. *Held,* that the consideration for defendant's promise to pay plaintiff the $100 did not fail because defendant did not avail himself of the option, the consideration for the promise being the option acquired by defendant to make a later payment on his contract and to apply plaintiff's payment thereon. *Hedstrom v. Schaumann,* 354

VENUE.

Place of trial upon issue in counterclaim.

1. Under sub. 7, sec. 2619, Stats., providing that certain forms of action shall be tried in the county of defendant's residence, the defendant in an action to recover on promissory notes had an absolute right, upon compliance with the statutory requirements, to have such action tried in the county of his residence, though the answer in effect admitted the cause of action set out in plaintiff's complaint and interposed a counterclaim, the venue of such case being determined by the complaint, and not the counterclaim, in view of secs. 2595, 2620, 2621, 2622, and 2655. *State ex rel. Meyer v. Park,* 452

Motion to change venue: When made.

2. Plaintiff's motion for a change of the place of trial at the same time that he moved for a new trial was not timely made, though it will be proper to make this motion in advance of another trial after a new trial has been granted. *Bruno v. Hickman,* 63

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VOCATIONAL SCHOOLS. See MUNICIPAL CORPORATIONS, 4, 5.
WAIVER.
Of appeal. See APPEAL, 2, 3, 6, 7.
Of fees. See SHERIFFS, 2.
Of jurisdiction. See PROHIBITION, 2.
Of notice of nonpayment. See GUARANTY, 4.
Of right to rescind. See PRINCIPAL AND AGENT, 6-8.
Of statute of limitations. See NEGLIGENCE, 4, 5.
WATERWORKS. See MUNICIPAL CORPORATIONS, 11, 23.

WILLS.

See EXECUTORS.

Construction: Legacy of existing debt.

1. Where testatrix entered into a contract with her daughter and son-in-law to sell them a lot on monthly instalments, and later executed her will bequeathing said lot to them absolutely on her death and directing that no further payment be required on said contract, and thereafter she deeded the lot to them and took a mortgage to secure the unpaid balance, the deed and mortgage did not operate as a revocation of the will, but the will operated upon the mortgage indebtedness, made a bequest of it, and vested absolute title to the lot in the daughter and her husband on the death of testatrix. *Will of Meyer,* 178

Same: Husband of adopted daughter as "child" of testatrix.

2. A clause in a will that any amount allowed to any of the children of testatrix on a claim for personal services to testatrix or to any of her children or adopted children should be deducted from the share of the claimant does not authorize the deduction of the amount allowed to a son-in-law for the support of an adopted child of testatrix from the share of a daughter who was claimant's wife. *Will of Vervoren,* 136

Same: Election to accept life estate or designated share.

3. Under a will giving testator's niece a life estate in the homestead and after the death of her mother, who was also given a life estate, giving her the election to rent it and receive the proceeds, and providing that, if she preferred, the premises might be sold and the proceeds divided between herself and two others, her election to sell and take one-third of the proceeds must be exercised at the time of the death of the mother or within a reasonable time thereafter. *Will of Britt,* 145

4. Although the will also authorized the executrix "to sell my real estate as hereinbefore provided," it gave her no authority to sell the property after occupying it for twenty years. *Ibid.*

WITNESSES.

See ADVERSE EXAMINATION. CONTEMPT. EVIDENCE, 2, 5.

Privileged communications: Attorney and client.

1. Under sec. 4076, Stats., declaring that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him as attorney, after the death of his client

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he is incompetent to testify to information given by the client, and, though such testimony was admitted without objection, it will be presumed to have been disregarded by the trial court, and will be disregarded on appeal. *Beilfuss v. Dinnauer,* 507

Examination of witnesses: Credibility: Conviction of criminal offense.

2. Under sec. 4073, Stats., authorizing proof of a conviction of a criminal offense to affect the credibility of a witness, a defendant sued for assault may be asked on cross-examination whether he was convicted for committing such assault, and the question, being competent to affect his credibility, cannot be excluded because of its irrelevancy on the question whether the assault was committed. *Bruno v. Hickman,* 63

Same: Immunity of witness from self-incrimination: Corporations.

3. Secs. 1791*j* to 1791*m*, Stats. 1919,—making unlawful any conspiracy on the part of any domestic corporation creating a monopoly or controlling prices, providing that the attorney general shall address inquiries to the officers of any corporation believed to have violated any provision of sec. 1791*j*, and declaring that no person shall be excused from answering any of such inquiries on the ground that the answer may tend to criminate him, but that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction or thing to which he may testify, except that the charter of the offending corporation may be forfeited,—apply only to proceedings by the state against a monopoly. *Nekoosa-Edwards P. Co. v. News P. Co.* 107

4. The burden of proof rests on the party denying the privilege against self-incrimination to show affirmatively that the statutes of limitation have run and that no suits begun within the statutory period are pending. *Ibid.*

5. A corporation is not a person within the meaning of amendm. V, Const. U. S., sec. 8, art. I, Const. Wis., or sec. 4077, Stats., providing that no person shall be compelled in any criminal case to be a witness against himself. *Ibid.*

6. A corporation in an action by a private party entitled to damages because of the violation of sec. 1747*e*, Stats., by the corporation, cannot lawfully refuse to allow its books and papers to be produced and inspected. *Ibid.*

7. A corporation cannot, on the theory that its officers or agents might be incriminated by a disclosure of the corporate records, prevent inspection of corporate books, the immunity against self-incrimination being a personal one, covering the officers and agents alone. *Ibid.*

Privileged communications. See CRIMINAL LAW, 4.

Expert witnesses. See PHYSICIANS.

WORDS AND PHRASES.

Baker, in insurance policy. See INSURANCE, 8.

Children, in will. See WILLS, 2.

Debt, in statute. See page 592.

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Dividends. See TAXATION, 8.
Fair market value, in statute. See TAXATION, 6.
For trust. See TRUSTS, 1.
Franchise, in statute. See pages 276, 277.
Habitually truant, in statute. See INFANTS, 2, 3.
Hotel, in deed. See COVENANTS, 2.
Incomes, in amendment to constitution. See TAXATION, 7.
Interpretation of contract. See CONTRACTS.
In trust. See DIVORCE, 10. TRUSTS, 1.
Matters, in statute. See SCHOOLS, 7.
Owner, in statute. See SCHOOLS, 8.
Person, in amendment to constitution. See WITNESSES, 5.
Post, in statute. See TAXATION, 16.
Publication, in statute. See TAXATION, 16.
Pus: See page 164.
Rental property, in statute. See page 460.
Service, in statute. See page 460.
Value in money, in statute. See TAXATION, 6.

WORKMEN'S COMPENSATION.

Construction to be given act.

1. The compensation act must be given a broad, liberal construction to the end that its beneficent purpose should be fully carried out. *Radtke Bros. & Korsch Co. v. Rutzinski,* 212

Services growing out of and incidental to employment.

2. In proceedings under the workmen's compensation act, the crucial question is whether at the time of the accident the employee was performing services growing out of and incidental to his employment; and a defendant may be held liable for compensation although he has used the utmost care, and a claimant may recover although he has been guilty of contributory negligence. *Radtke Bros. & Korsch Co. v. Rutzinski,* 212
3. An employee fourteen years of age, forbidden to operate a paper-cutter in appellant's print shop, was not entitled to compensation under the compensation act for injuries received while operating such machine at a time when he was engaged in making a tablet for his own benefit and when he was not observed by any one in authority. *Ibid.*

Same: Payment of temporary benefits as waiver of defense.

4. The fact that the employer paid the injured employee money during the time of temporary disability did not preclude the employer, in a proceeding under the compensation act, from making the defense that the employee at the time of the accident was not performing a service growing out of and incidental to his employment. *Radtke Bros. & Korsch Co. v. Rutzinski,* 212
5. In a proceeding under the compensation act, where the facts are undisputed, a finding of the commission that the employee at the time of the accident was performing a service growing out

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of and incidental to his employment is not binding on the courts, the construction of the statute being a question of law. *Ibid.*

WRITS.
Of error. See CONTEMPT, 1.
Of prohibition. See PROHIBITION.
Of restitution. See SHERIFFS.

Ex. J. M.
11/20 '21

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